Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, EX REL., PAUL BIDDLE,
Petitioner,

v.

BOARD OF TRUSTEES OF THE LELAND STANFORD, JR. UNIVERSITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an action under the *qui tam* provisions of the False Claims Act which is filed after public disclosure of the alleged fraud, but which is not derived from that disclosure, is "based upon" the public disclosure thereby requiring the relator to show that he is an original source.

2. Whether a Government employee who uncovers fraud and who defies his supervisors by investigating and reporting the fraud to Congress, is barred from pursuing a qui tam action because, as a Government employee having a general duty to refer fraud, he could not have "voluntarily provided" the fraud to the Government.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

United States *ex rel.* Paul Biddle ("Biddle") requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, *United States ex rel. Paul Biddle v. Board of Trustees of the Leland Stanford, Jr. University*, 161 F.3d 533 (9th Cir. 1998), is included in the appendix at App. 3a to 27a. The order and opinion of the United States District Court for the Northern District of California is not officially reported. It is included in the appendix at App. 28a to 43a.

JURISDICTION

The Ninth Circuit originally filed its opinion on May 26, 1998. Biddle filed a timely petition for rehearing and suggestion for rehearing *en banc* on June 23, 1998. The Ninth Circuit denied the petition for rehearing and rejected the suggestion for rehearing *en banc* on October 30, 1998.[1] The court amended its opinion to include Judge Kleinfeld's dissent on November 3, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1998).

STATUTORY PROVISIONS INVOLVED

This case turns on a reading of the False Claims Act, 31 U.S.C. § 3729, *et seq.* In particular, Biddle requests that this Court review a circuit split regarding the meaning of statutory language found at 31 U.S.C. § 3730(e)(4)(A) and (B). The relevant statutory language is reprinted at App. 44a to 45a.

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[1] The order denying rehearing is included in the Appendix at App. 1a to 2a.

STATEMENT OF THE CASE

Biddle filed this case, on behalf of the United States Government ("Government"), as a relator under the *qui tam* provisions of the False Claims Act ("FCA")[2] in order to recover fraudulently inflated indirect costs that Stanford University charged to the Government for federal research grants. The district court dismissed Biddle's complaint for lack of subject matter jurisdiction after finding that Biddle's action was "based upon" prior public disclosures of Stanford's fraud and that Biddle, by virtue of his role as a Government employee, had not "voluntarily provided" the information to the Government.

The Ninth Circuit affirmed the district court's dismissal, on the grounds that: (1) the allegations of fraud contained in Biddle's complaint were previously publicly disclosed; (2) the allegations in Biddle's complaint were "based upon" such public disclosures simply because they were similar in nature; and (3) Biddle was not an original source of the information because, as a Government employee, with a general duty to "refer" fraud, he could not have "*voluntarily* provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C.A. § 3730(e)(4)(B) (Supp. 1998) (emphasis added). Following this decision, Biddle sought rehearing. Although the Ninth Circuit denied Biddle's petition for rehearing, one judge on the panel was convinced that the majority's decision was in error. The court issued an amended opinion on November 3, 1998, to include Judge Kleinfeld's cogent dissent.

Judge Kleinfeld's dissent correctly recognized that the effect of the Ninth Circuit's opinion was to inappropriately bar all Government employees from acting as *qui tam* relators and that precedent mandated a finding that Biddle did voluntarily provide the information to the Government and, thus, subject

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[2] The district court had jurisdiction under 28 U.S.C. § 1331 and 31 U.S.C. §§ 3730(b)(1) and 3732(a).

matter jurisdiction was proper. Judge Kleinfeld refused to ignore the undisputed fact that Biddle had been told by his supervisors that investigation of fraud was not a part of his job duties. The fact that Biddle continued with his investigation and took his findings to Congress could not be rationally construed as being a part of his job duties according to Judge Kleinfeld:

> . . . [I]t is hard to conclude that a government employee's duty of voluntary disclosure to appropriate authorities includes going over his boss's head to a Congressional committee, and it is hard to reconcile so restrictive a construction with our own precedents, particularly *Hagood*.

App. at 27a.

Biddle seeks certiorari review of the Ninth Circuit's opinion in this case as it conflicts with the opinions of other circuits, is contrary to the plain meaning of the statutory language, and defies the intent behind Congress' 1986 amendments to the FCA. Biddle represents exactly the type of whistleblower Congress intended to encourage through its 1986 amendments to the FCA. Biddle single-handedly uncovered fraud against the United States, investigated it, and voluntarily provided the information to the Government. He did this even though his job duties did not require it and his supervisors opposed it. In fact, in defiance of his supervisors, he boldly and voluntarily provided the information to Congress.

A. Biddle's Discovery Of Stanford's Fraud And His Subsequent Efforts To Uncover It

Biddle became aware of Stanford's falsely inflated indirect cost rate and the "lavish spending" that Stanford charged to federal research grants, App. at 26a (Kleinfeld, J., dissenting), soon after starting work as an Administrative Contracting Officer ("ACO") at Stanford in 1988. Even

though investigating and ferreting out fraud was not part of Biddle's job duties, Biddle vigorously pursued his investigation and the information he uncovered as a result forms the basis of this action. Biddle first disclosed the information regarding Stanford's excessive indirect cost rate to his supervisors but they pressured him to continue approving those costs.

Indirect costs are those that are not associated with any particular project but instead cover overhead costs such as utilities and building maintenance indirectly related to federal research grants. The indirect cost rate is calculated as a percentage of direct costs. At Stanford, the indirect cost rate was 74 percent of direct costs and totaled over $600 million between 1980 and 1990. The average indirect cost rate charged by other universities at that time was 50 percent of direct costs. Stanford's indirect costs included such obviously false claims as a freshman orientation trip to the beach, depreciation on a 72-foot yacht, a wedding reception, and charges for antique furnishings, flowers, and personal laundering services for the president's residence, to name just a few. *See* Joan R. Bullock, *The Pebble in the Shoe: Making the Case for the Government Employee*, 60 Tenn. L. Rev. 365, 374 (1993) (discussing Biddle's case and listing instances of improper charges confirmed by the General Accounting Office).

Biddle initially reported his concerns regarding Stanford's inflated rate to his supervisors. His supervisors made light of his concerns and pressured him to continue approving inflated indirect cost rates for Stanford: "Remember Paul – you're not a bean counter now, you're an ACO [Administrative Contracting Officer]. If DCAA [Defense Contract Audit Agency] does not advise us of problems with these things, it's not for us to go in and find problems with them." App. at 21a. Despite continued documentation of the rampant fraudulent activity, his superiors at the Office of Naval Research ("ONR") continued to discourage him from pursuing his investigation and told him not to "rock the boat."

Biddle persisted. So did his supervisors. During an October 1989 review of his performance, ONR officials told Biddle to discontinue his independent efforts to uncover Stanford's fraudulent conduct. They also placed him on probation. Despite this resistance, Biddle "continued to do the audits he had been told were not his job." App. at 26a (Kleinfeld, J., dissenting). He pursued this investigation on his own time and using his own money.

Faced with intransigence from his supervisors, in the summer of 1990 Biddle "did something that was not his job," *id.*, and took his concerns to a staff member of Representative John Dingell, Chair of the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee ("the Subcommittee"). Representative Dingell acknowledged Biddle's "extraordinarily lonely battle" and credited Biddle with "exposing not only the situation at Stanford, which I believe will save the taxpayers tens of millions of dollars, but for exposing problems which I am confident will lead to similar savings across the country at other institutions." *Indirect Cost Recovery Practices at U.S. Universities for Federal Research Grants and Contracts: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. of Energy and Commerce*, 102d Cong. 1st Sess. 3 (Mar. 13, 1991).

Beginning in September of 1990, the media began reporting Biddle's whistleblowing efforts. Biddle was interviewed by numerous newspapers and magazines. The ABC news program "20/20" featured Biddle in a story on Stanford's indirect cost overcharges. As the district judge made clear, "It cannot . . . be seriously disputed that [Biddle] 'caused, triggered or instigated any public disclosures and the investigations that prompted any public disclosures'." App. at 34a.

Biddle's dogged efforts resulted in the exposure of massive overcharges that Stanford passed on to the Government in the name of "research." In response, in April of 1991, the ONR reduced Stanford's indirect cost rate from 76

percent to 55.5 percent, effective retroactively to September 1, 1990. The DCAA estimated Stanford's overcharges at roughly $15 to $18 million per year from 1983 through 1990. In 1991, taxpayers saved roughly $28 million from the reduced indirect cost rate instituted as a result of Biddle's efforts. Although Stanford brought an action against the Government to recover $56 million in indirect costs for fiscal years 1991 and 1992, Stanford settled the case by *paying* the Government $1.2 million.

The Navy awarded Biddle its Meritorious Civilian Service Award in 1991 for calling attention to the problems at Stanford. The *Stanford Review* named Biddle its "Man of the Year" in 1991 for being "the first with the courage to speak out" about Stanford's fraudulent practices. But for Biddle's decision to expose Stanford's fraudulent practices at great risk to his job, none of this information would have seen the light of day.

B. Biddle's Job Responsibilities

Biddle began working as an ACO and Resident Representative for the ONR at Stanford in October of 1988. As an ACO, Biddle's primary job responsibility was to negotiate and administer federal research contracts between the Government and Stanford.

Nothing in Biddle's job description or the regulations governing his position required Biddle to look for fraud, investigate it, report it to his superiors, and then, if his superiors failed to act, take his information to Congress and the public. Under the Federal Acquisition Regulations ("FAR") in effect during Biddle's employment, an ACO had authority "to enter into, administer, or terminate contracts and make related determinations and findings." 48 C.F.R. § 1.602-1(a) (1991). "Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships." *Id.* at § 1.602-2. In addition,

ACOs were authorized to "request and consider" advice from auditors, lawyers, engineers and other specialists as appropriate. *Id.* ACOs were not permitted, much less required, to investigate for fraud or audit the underlying books and records. In fact, as the majority opinion notes, at most an ACO had the authority to "*refer*" suspected fraud to "'the agency official responsible for investigating fraud.'" App. at 20a (quoting 48 C.F.R. § 33.209) (emphasis added).

The ONR does not have an audit staff and Biddle did not have auditing responsibilities nor did he have authority to conduct audits. The DCAA conducted all auditing of Stanford's federal research contracts. *See* App. at 19a.

C. Biddle's Civil Action Under The FCA

As the party responsible for bringing Stanford's false claims to light, Biddle sought to recoup some of the federal money lost to Stanford's excessive billing by filing an action under the FCA. *See* 31 U.S.C.A. § 3730(b) (Supp. 1998) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government"). Biddle filed his original complaint on September 9, 1991, based upon the information he uncovered through his own efforts and independent investigative work. Biddle filed his third amended complaint on August 30, 1995.

Stanford moved to dismiss the third amended complaint for lack of subject matter jurisdiction on April 23, 1996. Despite Biddle's arguments and proof that his action was based upon information which he and he alone compiled rather than upon the public disclosures which he triggered, on August 26, 1996, the United States District Court for the Northern District of California granted the motion.

REASONS FOR GRANTING THE PETITION

As Judge Henry of the Tenth Circuit aptly stated in dissent in *United States ex rel. Fine v. MK-Ferguson Co.*, "what the Congress giveth, some of the courts seem to taketh

away." 99 F.3d 1538, 1549 (10th Cir. 1996). In the face of clear Congressional intent to expand the universe of potential *qui tam* plaintiffs, *see Erickson ex rel. United States v. American Inst. Of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989), the Ninth Circuit has drastically restricted the scope of the *qui tam* provisions of the FCA both by its broad interpretation of the term "based upon" and by virtually closing the FCA door to all Government employees. The meaning of the words "based upon" in the subject matter jurisdiction provision of the FCA has caused substantial disagreement in the circuits. In addition, the effect of the Ninth Circuit's most recent pronouncement on the voluntariness requirement in the same provision effectively precludes *all* Government employees from acting as relators, *see* App. at 27a (Kleinfeld, J., dissenting), despite overwhelming agreement among courts and commentators that Congress did not intend to exclude Government employees from the FCA's civil action provisions. The Ninth Circuit's refusal to exercise subject matter jurisdiction under the FCA is contrary to the settled principle that federal courts have an "unflagging obligation" or "strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (citation omitted).

This Court should resolve the split in the circuits and clarify the meaning of the phrases "based upon" and "voluntarily provided" under the FCA. When a relator such as Biddle single-handedly discovers and discloses fraud upon the Government, the FCA is intended to reward such efforts through a *qui tam* action. In order to "revitalize the *qui tam* provisions" and "address the growing problem of fraud upon the Government," Congress acted in 1986 to "encourage *more* private enforcement suits." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d. Cir. 1991) (emphasis added). The Ninth Circuit has essentially rewritten the FCA in a manner which defeats, rather than serves, the paramount interests of the United States in the successful prosecution of *qui tam* suits under the FCA.

A. The Ninth Circuit's Interpretation Of "Based Upon" Is Contrary To The Plain Meaning Of The Statute, Is In Conflict With A Decision Of The Fourth Circuit As Well As Decisions In The First And Third Circuits, And Is Contrary To Congressional Intent.

"It cannot . . . be seriously disputed that [Biddle] 'caused, triggered or instigated any public disclosures and the investigations that prompted any public disclosures'." App. at 34a. What is disputed is whether Biddle's action is "based upon" those public disclosures simply because his suit contains information that Biddle previously disclosed. Such a tortured reading of the public disclosure bar directly conflicts with the plain meaning of the statute, decisions in other circuits, and the legislative history of the FCA.

1. The Ninth Circuit's interpretation of the public disclosure bar conflicts with the plain meaning of the statute and decisions in other circuits.

The Ninth Circuit, rather than applying the plain meaning of the statute and furthering the stated Congressional purpose of encouraging *qui tam* suits by true whistleblowers, has taken the illogical position that "if at the time a relator files a *qui tam* complaint, the allegations or transactions of the complaint have been publicly disclosed, then the allegations are 'based upon' the publicly disclosed information, and the relator must show that he is an original source." App. at 16a. Thus, the Ninth Circuit has established a per se rule that if information is in the public domain, any *qui tam* suit which contains substantially similar information is necessarily "based upon" such information. This reading of the statute leads to absurd results, ignores the plain meaning of the words "based upon," and conflicts with decisions in other circuits.

The plain meaning of "based upon" is "to make, form, or serve as a base for." Merriam Webster's Collegiate Dictionary at 94 (10th ed. 1997) (definition of "base" when used with "on" or "upon"); *see also United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994). To

comport with this plain meaning, therefore, a relator's complaint must be derived from public disclosures rather than merely similar to such disclosures. The Ninth Circuit's interpretation of "based upon" ignores this plain meaning and makes the statutory language superfluous by reading "based upon" to mean "same as."

As a practical matter, the Ninth Circuit's approach deletes the critical "based upon" language from the statute entirely. If the only question posed by this phrase is whether the allegations of the *qui tam* complaint are "substantially the same as" allegations that have been publicly disclosed, the analysis begins and ends with the determination that there has been a public disclosure. Put differently, if the allegations *of the complaint* have been publicly disclosed, it necessarily follows that they are the "same as" the public disclosures. "Based upon" in this context would therefore have no practical meaning.

In a well-reasoned opinion critical of the analysis of its sister circuits, the Fourth Circuit in *Siller* held that "based upon" in the FCA means "derived from." *Siller*, 21 F.3d at 1348. The Fourth Circuit primarily based its holding upon the common, straightforward meaning of the words "based upon." *See id.* The court also recognized, however, that this reading complied with Congress' intent to avoid parasitic lawsuits. This is so because even allegations that are identical to public disclosures are not parasitic if the allegations were not derived from such disclosures. *See id.*

> Preferring the plain meaning of the words enacted by Congress over our sister Circuits' as-yet unconsidered assumptions as to the meaning of those words, and over the Second Circuit's considered but unsupported interpretation, we hold that [the relator's] action was only "based upon" the disclosures . . . if [the relator] actually derived his allegations . . . from [the public disclosures].

Id. at 1349.

Similarly, district courts in the First and Third Circuits have held that "based upon" means "derived from." *See United States ex rel. Kusner v. Osteopathic Med. Center of Phila.*, 1996 WL 287259, No. CIV. A. 88-9753 (E.D. Pa. May 30, 1996); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351 (D. Mass. 1988). The *Kusner* court determined that the Fourth Circuit's reading "best matches both the language and intent" of the FCA. *Kusner*, 1996 WL 287259 *4. This was so because "this definition is consistent with the dictionary definition of the verb 'base'" and because the "same as" definition developed by other circuits was so broad that it covered actions where the relator had no knowledge of previous public disclosures. *Id.* Such a definition is also too broad where, as here, the relator actually caused the public disclosures.

Likewise, the *LaValley* court held that the relator's allegations were not based upon public disclosures because the allegations "did not originate from" those public disclosures. *LaValley*, 707 F. Supp. at 1367. The *LaValley* court then recognized that it was not necessary to determine whether or not the relator was an original source because this inquiry was only necessary when the relator obtains information in its complaint from the public domain. *See id.*

The decisions of these courts correctly demonstrate how the public disclosure bar of the FCA is intended to work. If the relator derives the allegations in his complaint from public information, then the relator must also prove he has some direct and independent knowledge of the alleged fraud and that he has "voluntarily provided" that information to the Government. In this way, the original source inquiry logically ties into the provisions limiting recovery based upon the amount of first-hand information the relator contributes to the complaint. *See* 31 U.S.C.A. § 3730(d)(1) (limiting the percentage of a *qui tam* relator's recovery according to the amount of first-hand information the relator provided). If the

relator can demonstrate that his knowledge was not derived from public disclosures, then the relator need not demonstrate the additional elements needed to prove he is an original source. This is so because such a relator's action is in no way parasitic.

Although other circuits disagree with these courts and have construed "based upon" to mean "substantially the same as," few have provided sound reasoning for such a broad interpretation of the phrase and none has explained why Congress included the language if it was to have no effect. The Tenth Circuit held that the test for whether or not information in a *qui tam* suit is "based upon" a public disclosure is whether "substantial identity" exists between the complaint and the public disclosures. *See MK-Ferguson*, 99 F.3d at 1545 (quoting *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 553-4 (10th Cir. 1992)). This test, according to the Tenth Circuit, is merely intended to act as a "quick trigger" that leads directly to the original source question. *Id.*; *accord*, *United States ex rel. McKenzie v. Bellsouth Telecomm., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 855 (1998); *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992). Rather than viewing the language as a mere "quick trigger," which essentially gives the statutory language no effect, the "based upon" language should trigger the original source inquiry only when there is a risk that the lawsuit before the court is a parasitic one, *i.e.*, only where the complaint is derived from public disclosures.

Courts that have reviewed the legislative history of the FCA acknowledge that Congress' primary purpose in amending the Act was to "encourag[e] whistleblowing and discourag[e] opportunistic behavior." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 683 (D.C. Cir. 1997) (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994)); *see also McKenzie*, 123 F.3d at 938 (noting Congress acted "in the interest of

avoiding parasitic suits"). Where a relator derives no information from public disclosures, the suit is obviously not parasitic. *See Siller*, 21 F.3d at 1348 (suit "simply is not, in any sense, parasitic" where information not derived from public disclosures). When, however, the relator derives some information from public information, the relator should be required to prove that he has some direct and independent knowledge of the alleged fraud that was voluntarily provided to the Government. The "original source" inquiry should be a separate inquiry from the "based upon" analysis, and it is only necessary when there is a risk of a parasitic suit. To the extent they overlap, courts are not free to replace or change statutory language in order to avoid such an overlap. The Ninth Circuit's opinion must be reviewed by this Court to resolve the conflict in the circuits on this important matter and to give meaningful effect to Congress' expansion of jurisdiction under the FCA.

2. The Ninth Circuit's interpretation conflicts with the legislative purpose of expanding *qui tam* jurisdiction.

The FCA has a long history – one which indisputably demonstrates the benefits to the Government of allowing broad *qui tam* jurisdiction. The Act was originally enacted in 1863, in the midst of the Civil War, to counteract the depredations of war profiteers whose shoddy goods and inflated prices were wreaking havoc upon the federal army's efforts in combat. At a time pre-dating even the formation of the Department of Justice, the Government was ill-equipped to investigate or prosecute such widespread fraud. Consequently, Congress turned to the ancient common law device of a *qui tam* action, in which a private citizen is permitted to prosecute a fraud action on behalf of the sovereign government, and, if the civil suit is successful, to receive a percentage of the recovered proceeds as a reward for his efforts. *See generally* James B. Helmer, Jr. and Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in*

the United States ex rel. Gravitt v. General Electric Co. Litigation, 18 OHIO N. U. L. REV. 35 (1991) (hereinafter *War Stories*).

The statute as originally enacted, however, led to misuse and abuse of its provisions in the first half of this century. For example, one relator brought suit against offenders using information copied directly from criminal indictments already brought by the Government. *See Findley*, 105 F.3d at 680. Such *qui tam* actions were labelled "parasitic lawsuits." They were based entirely upon information already known to the government, and indeed, upon information already investigated and developed by the government into cognizable allegations of fraud. Yet in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), when the government argued that the relator's complaint had merely been copied from the criminal indictment, this Court pointed out that the *qui tam* action had still worked precisely as intended by the original False Claims Act:

> Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed. The suit results in a net recovery to the government of $150,000, three times as much as the fines imposed in the criminal proceedings; and this recovery was obtained at the risk of a considerable loss to the petitioner since § 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation.

Marcus, 317 U.S. at 545-546.

As a result of such lawsuits, Congress amended the FCA in 1943 to limit the subject matter jurisdiction of federal courts under the FCA. *See Findey*, 105 F.3d at 680. As amended, the FCA in 1943 "contained a broad jurisdictional bar against *qui tam* suits . . . 'based upon evidence or information in the

possession of the United States or any agency, officer or employee thereof, at the time such suit was brought.'" *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991) (quoting the 1943 version of the FCA). Thus, this language expressly prohibited government employees from bringing *qui tam* actions. Not surprisingly, this language also "virtually eliminated the *qui tam* suit as an effective weapon in combating fraud upon the United States Government," not only because of the substantially reduced award, but primarily because "[d]efense contractors were almost always able to find a government official somewhere who had knowledge of the fraudulent activities in which the contractor was engaging." Helmer and Neff, *War Stories* at 39 - 40.

By the 1980s, however, there was strong concern that in attempting to address the problem of parasitic suits, the 1943 amendments had gone too far in attempting to avoid parasitic lawsuits. As a result of the drastic limitations imposed by the 1943 amendments and the cases interpreting those amendments, Congress again acted to amend the FCA in 1986. *See Findley*, 105 F.3d at 680. The 1986 amendments sought to achieve a middle ground between the parasitic suits of the early 1900's and the overly restrictive 1943 amendments. *See id.* The amendments were aimed not only at increasing the reports which *exposed* fraud, but, more importantly, at enlisting the aid of the citizenry in the actual labor of enforcing the FCA and in recouping defrauded federal funds. *See* 1986 U.S.C.C.A.N 5266, 5273 (recognizing that federal government has scarce resources to prosecute fraud and that large corporations can devote considerable money and manpower to their defense). "One theme recurring through the legislative history in 1985 is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud." *Stinson*, 944 F.2d at 1154.

The public disclosure bar, as amended in 1986, now reads in pertinent part as follows:

> (4)(A) No court shall have jurisdiction over an

> action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C.A. § 3730(e)(4)(A), (B) (Supp. 1998).

Under this new statutory framework, courts must first determine whether there has been a public disclosure and then determine whether the relator's suit is based upon those public disclosures. Only if the court answers yes to both of these inquiries should the court go on to consider the third issue, whether the relator is the original source of the information in the suit. *See MK-Ferguson Co.*, 99 F.3d at 1544; *Williams*, 931 F.2d at 1500.

The legislative history supports a reading of the statute which broadens rather than constricts subject matter jurisdiction while still preventing parasitic suits from proceeding. *See Findley*, 105 F.3d at 683. Yet the decision of the Ninth Circuit which is now before this Court threatens to undercut the efficacy of the FCA in a profound manner. The Ninth Circuit has read into the FCA a restriction on the district court's jurisdiction which appears nowhere in the language of the FCA. Consequently, this interpretation of the statute which threatens to dramatically reduce the available pool of potential *qui tam* plaintiffs presents questions of profound

importance, particularly where the approach adopted by the Ninth Circuit is both at odds with other courts and contrary to congressional intent.

B. Contrary To The Law Of Other Circuits, The Ninth Circuit's Interpretation Of "Voluntarily" Effectively Precludes All Government Employees From Acting As Relators Under The FCA And Contradicts The Ninth Circuit's Own Precedent And Congressional Intent.

Having determined that Biddle's fraud allegations were based upon public disclosures, the Ninth Circuit went on to conduct the original source inquiry under 31 U.S.C. § 3730(e)(4)(B), relying on regulations which provide contracting officers with general duties to protect the Government. *See* App. at 19a - 20a.. The Ninth Circuit held that while Biddle did have direct and independent knowledge of Stanford's fraud upon the Government, *see* App. at 17a, Biddle could not qualify as an "original source" because his job duties as an ACO precluded any finding that he "voluntarily provided" such information to the Government. *See* App. at 23a. Judge Kleinfeld, in contrast, would have found Biddle to be an original source. Judge Kleinfeld recognized that nothing in Biddle's job description or in the regulations governing his position required Biddle to take his investigation as far as he did. In addition, Judge Kleinfeld acknowledged that the effect of the majority's ruling would be to eliminate Government employees as a class from the FCA's *qui tam* provisions.

The majority opinion presents an important question of federal law because, as the dissenting opinion recognized, the opinion bars all federal employees from acting as *qui tam* relators despite the fact that Congress supplied no such ban in the wording of the statute and all other courts that have considered the question have held that Government employees are proper *qui tam* plaintiffs. *See infra* pp. 19-20 (listing cases holding that Government employees are proper *qui tam* relators). Thus, if the *Biddle* opinion remains unreviewed by this Court, an entire class of potential *qui tam* relators

throughout the entire western region is eliminated despite the fact that Congress included no such bar in the FCA. The fact that Congress did bar some Government employees from proceeding under the statute weighs heavily against the Ninth Circuit's interpretation of the FCA. *See* 31 U.S.C.A. § 3730(e)(1). It is inconsistent with Congress' intent and the purposes of *qui tam* litigation to eliminate an entire class of potential relators from the FCA because they labor under a general duty to protect the Government from fraud. Such a reading of the statute is judicial legislation at its worst and flies in the face of Congress' desire to encourage *qui tam* relators to report and recover fraudulently seized public funds.

1. Biddle's job duties did not require that he ferret out fraud, investigate it, and report it to Congress.

Biddle single-handedly uncovered Stanford's fraudulent conduct. Biddle then investigated the fraud and reported the fraud to his superiors.

> But then Biddle did something that was not his job. He continued to do the audits he had been told were not his job, told a committee of Congress what he had found, and triggered an investigation. The investigation bore fruit. . . . [H]e voluntarily made the disclosure to Congress, so is entitled to be treated as an original source for purposes of the statute.

App. at 26a (Kleinfeld, J., dissenting).

Despite Biddle's obvious efforts to continue his investigation even after his supervisors told him not to, the majority held that Biddle was "merely doing his job" when he independently investigated and discovered the fraud. App. at 22a. The majority relied on two particular Federal Acquisition Regulations ("FAR") to come to this conclusion. One required contracting officers to "*safeguard[] the interests of the United*

States in its contractual relationships" while the other required contracting officers to "*refer*" fraud on the part of contractors to "*the agency official responsible for investigating fraud.*" App. at 19a - 20a (quoting 48 C.F.R. §§ 1.602-2, 33.209) (emphasis added). Even assuming for purposes of this petition that these regulations apply to Biddle, the regulations clearly state that Biddle should have referred the fraud elsewhere rather than investigate it himself. The regulations also do not require Biddle to continue investigating and then go on to Congress when faced with obstinacy on the part of his supervisors.

Biddle was not an auditor and the regulations governing his position did not give him auditing powers. Moreover, Biddle's job duties did not require him to take the next steps of continuing the investigation once his supervisors instructed him not to and then reporting the fraud to Congress.

The Ninth Circuit adopted the illogical holding that the FAR barred Biddle from acting voluntarily after deciding that any other rule would create "'perverse incentives' for similarly-situated government employees" and would lead to a race to the courthouse between the Government and its employees. *Id.* at 22a. Logic and history suggest, however, that rather than creating "perverse incentives," allowing Government employees to pursue FCA litigation actually prompts such employees to disclose fraud that would otherwise go unreported, ultimately resulting in substantially greater recoveries of defrauded funds. *See* Bullock, 60 Tenn. L. Rev. at 383 (using Biddle as an example of why Government employees should be allowed to pursue FCA claims and discussing a 1983 survey finding that sixty-nine percent of Government employees who had knowledge of illegalities failed to report the information). It is because of this benefit and Congressional intent to allow Government employees to pursue *qui tam* actions that every court to review the question has decided that Government employees are proper *qui tam* plaintiffs. *See Williams*, 931 F.2d at 1501; *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990),

cert. denied, 499 U.S. 921 (1991); *United States ex rel. McDowell v. McDonnell Douglas Corp.*, 755 F. Supp. 1038, 1040 (M.D. Ga. 1991); *United States ex rel. Givler v. Smith*, 760 F. Supp. 72, 74 (E.D. Pa. 1991); *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1161 (S.D. Fla. 1990); *Erickson*, 716 F. Supp. at 918.

2. The Ninth Circuit's interpretation of "voluntarily" conflicts with the Congressional purpose of increasing the courts' subject matter jurisdiction.

Prior to 1986, no Government employee could bring suit under the *qui tam* provisions of the FCA. *See Erickson*, 716 F. Supp. at 918; *supra* pp. 14-15. The 1943 version of the FCA barred *qui tam* suits "'based upon evidence or information in the possession of the United States or any agency, officer or employee thereof, at the time such suit was brought.'" *Williams*, 931 F.2d at 1497 (quoting the 1943 version of the FCA). Thus, after 1943, Government employees were expressly excluded from bringing *qui tam* actions as were any other relators whose information was in the hands of the Government when the suit was filed. *See Erickson*, 716 F. Supp. at 916. In 1986, however, Congress eliminated this broad language, created the public disclosure bar, and created three other express statutory exceptions to the courts' subject matter jurisdiction. *See* 31 U.S.C.A. §§ 3730(e)(1) to (4).[3]

---

[3] In addition to the public disclosure bar, no court has jurisdiction over an action "brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person's service in the armed forces." 31 U.S.C.A. § 3730(e)(1). Section (e)(2)(A) prohibits courts from exercising jurisdiction over certain cases "against a Member of Congress, a member of the judiciary, or a senior executive branch official." Section (e)(3) bars certain actions in which the Government is already a party.

In what is apparently the only direct legislative history on the use of the term "voluntarily" in the 1986 amendments to the FCA, Senator Grassley stated that

> The requirement that the individual "voluntarily" informed the Government or news media is meant to preclude the ability of an individual to sue under the qui tam section of the False Claims Act when . . . the individual was a source of the allegations only because the individual was *subpoenaed to come forward*. However, those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information which later led to a public disclosure would be considered to have "voluntarily" informed the Government or media and therefore considered eligible qui tam relators.

132 Cong. Rec. 20531, 20536 (1986) (comments of Senator Grassley) (emphasis added). In addition to this statement by Senator Grassley, courts and commentators alike acknowledge that the 1986 amendments did away with the absolute bar on Government employees serving as relators. *See Williams*, 931 F.2d at 1502; Dorothea Beane, *Qui Tam Actions - Are Government Employees Proper Qui Tam Plaintiffs?*, 14 J. Legal Med. 279, 289 (1993).

Finally, legislative history establishes that the 1986 amendments were enacted in large part as a reaction to the Seventh Circuit's decision in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). Congress was urged to "rectify the unfortunate result" of the *Dean* decision. 1986 U.S.C.C.A.N. 5278. Congress responded accordingly by "correcting restrictive interpretations of the act's . . . *qui tam* jurisdiction." *Id.* at 5269.

What made the *Dean* decision "perverse" and "particularly harsh" was the fact that the relator, the State of

Wisconsin, "was required by another statute to submit the information to the federal Government." *Stinson*, 944 F.2d at 1163 (Scirica, J. dissenting); *see also Findley*, 105 F.3d at 680 ("another defect" of the FCA before 1986 was the outcome of the *Dean* case); *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) (the *Dean* court's "restrictive interpretation [of the FCA] was too much for Congress"). The State of Wisconsin uncovered the fraudulent Medicaid reimbursement practices of Dr. Alice Dean. Wisconsin disclosed the fraud to the United States Department of Health and Human Services as required by the state's participation in the Medicare reimbursement program. *See Dean*, 729 F.2d at 1103. When Wisconsin filed an FCA suit against Dean, the Seventh Circuit ordered the district court to dismiss the suit for lack of subject matter jurisdiction. *See id.* at 1106-07. The 1943 version of the FCA mandated such an outcome because the information underlying the suit was already in the hands of the Government at the time the suit was filed. The statute made no exceptions even where, as in *Dean*, the relator was required by law to disclose information to the Government. *See id.* at 1106. In reviewing the legislative history of the 1943 amendments, the Seventh Circuit noted that "the language clearly excludes the appellees where they were required to provide the Government with the information upon which this action was based, such information was not, therefore, 'voluntarily disclosed'." *Id.* at 1106.

Despite this legislative history and the understanding that the 1986 amendments were meant to rectify the inequity of the *Dean* result, the Ninth Circuit's holding in *Biddle* takes away what Congress conferred by holding that any duty to refer or report fraud bars such person from serving as a relator. The Ninth Circuit held that because Biddle had a duty to report fraud, that he was "merely doing his job" when he independently investigated and discovered the fraud. App. at 22a. Under this reasoning, Wisconsin also would be prohibited from qualifying as an original source because federal law required the state to report the fraud and the state was, therefore, under a duty or obligation to do so. Thus, under the

Ninth Circuit's reasoning, Wisconsin was not acting voluntarily in *Dean* anymore than Biddle acted voluntarily in this case. This result is not only incongruous because it gives no effect to the 1986 amendments, but also because it contradicts Ninth Circuit precedent finding that Congress acted in 1986 to "'correct' opinions like *Dean*," and to "encourage insiders privy to a fraud on the Government to blow the whistle on the crime." *Wang*, 975 F.2d at 1419. The Ninth Circuit was correct in *Wang* that there is "little point in rewarding a second toot" of the whistle. *Id.* Biddle, however, was the first, loudest, and only toot sounding against Stanford's fraudulent conduct.

3. The Ninth Circuit's holding would prohibit *all* Government employees from acting as *qui tam* relators, in conflict with Ninth Circuit case law and the holdings of other jurisdictions that the 1986 amendments to the FCA did not bar Government employees from bringing *qui tam* actions.

Under the FCA Congress did, in certain circumstances, bar federal employees from acting as *qui tam* relators. *See e.g.*, 31 U.S.C.A. § 3730(e)(1). However, the Ninth Circuit has legislated a sweeping new exception to the FCA's subject matter jurisdiction provision: federal employees can never act as *qui tam* relators. This result directly conflicts with prior Ninth Circuit precedent and with other circuits' holdings that Government employees are proper *qui tam* relators. Judge Kleinfeld appropriately pointed out the gravity of this holding in his dissent:

> Does *Biddle* mean that no government employee can recover in a qui tam case? We noted in *Fine* that an executive order obligates all Government employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities." That executive order is considerably clearer in obligating

> employees to report fraud than the regulation we rely on in the case at bar, so if the regulation in the case at bar eliminates voluntariness, it would seem to follow *a fortiori* that the executive order cited in *Fine* eliminates voluntariness for all government employees.

App. at 26a - 27a (Kleinfeld, J., dissenting) (citations omitted).

In contrast to the majority's holding, it is well established that in keeping with its intent to broaden the pool of potential relators and to expand the courts' jurisdiction to hear such cases, Congress chose to treat Government employees in the same fashion as other potential relators, as courts and commentators have agreed:

> A court's analysis of qui tam standing in a Government employee's false claim must not differ from analysis applied to other citizens' standings. Any qui tam relator may sue if the individual falls outside the four exceptions of section 3730(e).

Beane, 14 J. Legal Med. at 289 (citation omitted).

> To read the False Claims Act to prohibit government employees from initiating *qui tam* actions based upon information acquired in the course of their Government employment, would render superfluous one of the four limits on jurisdiction in section 3730(e) of the Act.

Williams, 931 F.2d at 1502. This is so because the first jurisdictional limitation in section 3730(e) applies to members of the armed forces. *See* 31 U.S.C. § 3730(e)(1). Courts should not imply additional exceptions where Congress has

provided specific ones in a statute. *See Williams*, 931 F.2d at 1502.

> In defining the classes of persons eligible to bring *qui tam* actions, Congress had a choice: It could have chosen to make eligible as *qui tam* relators only certain defined groups of persons and exclude all others or it could have chosen to include all persons as eligible *qui tam* relators with certain specific exceptions. It chose the latter scheme.

Erickson, 716 F. Supp. at 912. Thus, it is clear that Congress acted in 1986 to broaden *qui tam* jurisdiction. This purpose cannot be carried out by creating a new exception to subject matter jurisdiction through a strained interpretation of the term "voluntarily." Rather than reading this term "voluntarily" to comply with legislative intent, its own precedent and the unanimous decisions of other courts that Government employees may bring suit under the FCA, the Ninth Circuit essentially holds that Government employees lose their ability to act voluntarily in reporting fraud once they enter public service. *See* App. at 26a - 27a (Kleinfeld, J., dissenting).

In the first of its opinions to review the "voluntarily" language, the Ninth Circuit issued a divided, *en banc* opinion affirming the dismissal of a Government employee's *qui tam* suit because the relator did not voluntarily disclose his information to the Government. *See United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995) (including three concurrences and one dissent). The relator in that case, Harold Fine, was an auditor for the Office of the Inspector General. Fine supervised audits and edited audit reports. His "paramount responsibility," according to the majority, was his duty to discover and disclose fraud to his supervisors. *Id.* at 742-43. For this reason, the majority determined that Fine "was no volunteer" because "the very terms of his employment" required him to uncover and disclose fraud. *Id.* at 743.

The relator in *Fine* argued that the court should not hold that his actions were involuntary because this would preclude all federal employees from acting voluntarily under the FCA. This was so because "every federal employee labors under a duty to report fraud against the Government" by virtue of Executive Order No. 12,674. *Id.* at 744. The Order states that "employees shall disclose waste, fraud, abuse, and corruption to appropriate federal employees." *Id.* (quoting Executive Order 12,674, 54 Fed. Reg. 15,159 § 101(k) (1989) (now found at 5 C.F.R. § 2635.101(a)(11) (1998)). The *Fine* majority avoided this conundrum by holding that "Fine was employed *specifically* to disclose fraud." *Id.* (emphasis added.).

Judge Leavy's dissent, joined by Judge Reinhardt, argued that the majority was legislating on behalf of Congress by writing an exception into the statute for Inspector General employees without any indication that Congress intended such an exception. *See id.* at 749 (Leavy, J., dissenting). Judge Leavy wrote that "[i]t is incongruous for the majority to read these amendments to bar a Government employee . . . who reported the fraud to his supervisors and unsuccessfully urged them to act from bringing a qui tam action." *Id.* Judge Leavy addressed the concerns raised by the Executive Order head on, noting that if Congress intended to bar Government employees from bringing *qui tam* actions, it could have written such an exception into the statute with clear and direct language rather than "creating an implicit bar through the requirement that a disclosure be made 'voluntarily'." *Id.* at 750 (Leavy, J., dissenting). As the dissent aptly put it – "Why would the Government be less willing to take dollars recovered by an Inspector General employee than by any other Government employee or by any other person?" *Id.*

In the second of the Ninth Circuit's opinions reviewing the "voluntarily" language of the FCA, the court upheld subject matter jurisdiction over a Government employee's *qui tam* action. *See Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir 1996). The relator in that case, James Hagood,

was a lawyer and an Assistant District Counsel to the U.S. Army Corps of Engineers ("Corps"). *See id.* at 1469. Hagood uncovered fraud against the Government in the course of his work as legal counsel for the Warm Springs Dam project. The panel held that Hagood "voluntarily provided his superiors in the Corps" with the information he uncovered. *Id.* at 1476. Judge Kleinfeld wrote separately to express his opinion that because all lawyers are required by the Rules of Professional Conduct to give honest opinions to their clients and to not assist in criminal or fraudulent conduct, Hagood's actions in disclosing the fraud were not voluntary, but mandatory. Thus, according to Judge Kleinfeld, *Fine* should have controlled the outcome of Hagood's case. *See id.* at 1479-80 (Kleinfeld, J., dissenting).

In his dissent in this case, Judge Kleinfeld noted that the general regulations requiring Biddle to "safeguard[] the interests of the United States" could not impose a greater duty on Biddle than the duty a lawyer has to inform a client of wrongdoing. App. at 26a. Thus, *Hagood* should have controlled and Biddle should be allowed to proceed as an original source. *Id.* In addition, even if such a specific duty did exist, Biddle certainly was under no duty to continue with his efforts after his supervisors told him to stop. App. at 27a. Finally, Judge Kleinfeld acknowledged that the majority opinion closed the door for Government employees acting as qui tam relators by recognizing that the "executive order is considerably clearer in obligating employees to report fraud than the regulation" relied on by the majority. App. at 26a.

In contrast, the majority relies on regulations which direct contracting officers to "*refer*" fraud "*to the agency official responsible for investigating fraud*" and to safeguard the Government. App. at 19a - 20a (quoting 48 C.F.R. §§ 1.602-2, 33.209) (emphasis added). The majority blithely ignored the import of this holding – that all Government employees would be barred from pursuing *qui tam* actions because all Government employees labor under a more specific duty to "disclose waste, fraud, abuse, and corruption to

appropriate authorities." App. at 26a (Kleinfeld, J., dissenting) (quoting Executive Order No. 12,674 and recognizing that it applies to all Government employees). This Court should grant the petition in order to review the Ninth Circuit's attempt to legislate amendments to the FCA never intended by Congress.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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No. 99-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA EX REL., PAUL BIDDLE,
Petitioner,

v.

BOARD OF TRUSTEES OF THE LELAND STANFORD, JR. UNIVERSITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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January 28, 1999

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., Paul Biddle,	)	No. 96-16911
	)	D.C. No.
Plaintiff-Appellant,	)	CV-91-20618-RMW
v.	)	
	)	ORDER
BOARD OF TRUSTEES OF THE LELAND STANFORD, JR. UNIVERSITY,	)	Filed 10/30/98
Defendant-Appellee.	)	

Before: BOOCHEVER and KLEINFELD, Circuit Judges, WILSON*, District Judge.

Judges Boochever and Wilson have voted to deny the petition for rehearing, and Judge Kleinfeld has voted to grant the petition for rehearing. Judge Kleinfeld has voted to accept the suggestion for rehearing en banc, and Judges Boochever and Wilson have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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*The Honorable Stephen V. Wilson, United States District Judge for the Central District of California, sitting by designation.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., Paul Biddle,	)	No. 96-16911
Plaintiff-Appellant,	)	D.C. No. C-91-20618 RMW
v.	)	
BOARD OF TRUSTEES OF THE LELAND STANFORD, JR. UNIVERSITY,	)	ORDER AND AMENDED OPINION
Defendant-Appellee.	)	
		Filed 10/30/98

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
November 5, 1997 - San Francisco, California

Filed May 26, 1998
Amended November 3, 1998

Before: Robert Boochever, Senior Circuit Judge, Andrew J. Kleinfeld, Circuit Judge, and Stephen V. Wilson, District Judge.*

Opinion by District Judge Wilson; Dissent by Judge Kleinfeld

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ORDER

The Slip Opinion filed May 26, 1998 is amended to include Judge Kleinfeld's dissent.

OPINION

WILSON, District Judge:

Paul Biddle appeals the district court's dismissal of his cause of action for lack of subject matter jurisdiction. Biddle brought a *qui tam* lawsuit against the Board of Trustees of the Leland Stanford, Jr. University ("Stanford") pursuant to the False Claims Act ("FCA"), 31 U.S.C. § 3730, alleging that

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* The Honorable Stephen V. Wilson, United States District Court for the Central District of California, sitting by designation.

Stanford defrauded the United States Government. Because the district court lacks subject matter jurisdiction over Biddle's lawsuit, we affirm.

BACKGROUND

Federal government agencies regularly enter into agreements with Stanford and other universities for research and other activities to be performed by the universities. The agreements are designed to reimburse the universities for both direct and indirect costs, as well as staff benefits. Direct costs include salaries and supplies for a particular project. Indirect costs are a method to allow a university to be reimbursed for a share of its overhead, such as costs of buildings, equipment, utilities, and administrative support. The Office of Naval Research ("ONR") is responsible for setting indirect cost rates and staff benefits at Stanford. The agreements between ONR and Stanford for calculating indirect costs are called Memoranda of Understanding.

In October of 1988, Biddle was hired as Administrative Contracting officer ("ACO") and Resident Representative for ONR at Stanford. Soon thereafter, Biddle came to believe that Stanford was overcharging the government for indirect costs. After informing his supervisors to no avail, Biddle relayed his concerns to a congressional subcommittee in the summer of 1990. As a result of Biddle's revelations, the General Accounting Office and the Defense Contract Audit Agency began an investigation of Stanford.

In September of 1990, the media began reporting on Biddle's allegations against Stanford. Biddle was interviewed by numerous newspapers and magazines, and was featured on the ABC news program "20/20." In 1991, Stanford's indirect cost rate was reduced from 76% to 55.5%.

On September 9, 1991, after more than one year of extensive media coverage of Stanford's alleged overcharges, Biddle filed a *qui tam* suit under the False Claims Act.

Following a two-year investigation, the Department of Justice decided not to intervene in Biddle's lawsuit. Biddle's complaint was then served on Stanford. On August 30, 1995, Biddle filed his third amended complaint. Stanford moved to dismiss the complaint for lack of subject matter jurisdiction. On August 26, 1996, the district court granted Stanford's motion. Specifically, the district court held that Biddle's complaint was jurisdictionally barred because (1) it was based upon public disclosures, and (2) Biddle did not qualify as an original source of the information he provided to the government.

STANDARD OF REVIEW

The existence of subject matter jurisdiction is a question of law reviewed *de novo*. *Ma v. Reno*, 114 F.3d 128, 130 (9th Cir. 1997). This court also reviews *de novo* the district court's conclusion that it lacks subject matter jurisdiction. *H2O Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914, 916 (9th Cir. 1996). In making its determination, the district court may resolve factual disputes based on the evidence presented where the jurisdictional issue is separable from the merits of the case. *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987). The district court's findings of fact relevant to its determination of subject matter jurisdiction are reviewed for clear error. *Id.*

DISCUSSION

Under the False Claims Act, any person who defrauds the United States Government is liable for civil penalties. 31 U.S.C. § 3729 (1994). Although the FCA requires the Attorney General to investigate possible violations, *id.* § 3730(a), the FCA also permits civil *qui tam* actions by private persons, known as relators, *id.* § 3730(b). In a *qui tam* action, the relator sues on behalf of the government as well as himself. If the relator prevails, he receives a percentage of the recovery, with the remainder being paid to the government.

Congress, however, has limited the jurisdiction of courts over *qui tam* actions:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

Id. § 3730(e)(4)(A). "Original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *Id.* § 3730(e)(4)B).

I. Were the disclosures of Stanford's alleged fraud "public disclosures" under the FCA?

Biddle first argues that the district court erred in ruling that the disclosures of Stanford's alleged fraud through governmental investigations and media reports constituted "public disclosures" under the FCA. Biddle relies on *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994), for the proposition that if an individual provides information to the government that causes a governmental investigation, and evidence of fraud or wrongdoing is made public during the government's investigation, then allegations regarding the fraud are not treated as publicly disclosed under the FCA.

In *Barajas*, the plaintiff brought a *qui tam* suit against Northrop for fraudulent activities. Following Northrop's

indictment, the plaintiff amended his complaint, adding an allegation that Northrop was using inadequate damping fluid in its flight data transmitters. The plaintiff admitted that after he left Northrop, he learned of the damping fluid problem through a newspaper article that reported on Northrop's indictment. The investigation leading up to the indictment may have been based on information that the plaintiff provided to the government. We held that a "disclosure resulting from a criminal investigation by the government based on information provided by a *qui tam* plaintiff" does not bar the action under § 3730(e)(4)(A). *Id.* at 411-12. Biddle asserts that all of the disclosures regarding Stanford's alleged fraud resulted from a governmental investigation, which was triggered when Biddle provided the government with the pertinent information. Thus, Biddle argues, the disclosures are not "public disclosures" under *Barajas*.

Stanford contends that this court's decision in *United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir.), *cert. denied*, 117 S. Ct. 361 (1996), is controlling. In *Devlin*, a government employee informed the plaintiffs of alleged fraud in which the employee had participated by falsifying records. Shortly thereafter, one of the plaintiffs met a newspaper reporter and told him about the alleged fraud. The newspaper then published an article describing the allegedly fraudulent conduct. Five days after the article was published, the plaintiffs filed their *qui tam* action. This court held that because the action was filed after the newspaper publicly disclosed the allegations of fraud, the district court lacked subject matter jurisdiction, unless the plaintiffs were an "original source" of the information upon which the allegations were based. *Id.* at 359.

[1] We believe that *Devlin* is dispositive, and that Biddle misreads *Barajas*. In *Barajas*, the allegations against the defendant became public because the government obtained an indictment against the defendant. The court reasoned that if the allegations in the indictment were deemed publicly

disclosed, then the government could "limit the potential recovery of *qui tam* plaintiffs unfairly simply by initiating a criminal investigation." *Barajas*, 5 F.3d at 411. In contrast, Biddle himself was responsible for the story reaching the public in that he disclosed the alleged fraud to the media. For example, Biddle appeared on the news program "20/20," which aired in March of 1991. Thus, the present case is similar to *Devlin*, in that the relator in each case personally disclosed information to the media. The rationale of *Barajas* that the government should not be able to stifle a plaintiff's *qui tam* suit by launching a public investigation does not apply where the relator himself was involved in the public disclosure of the allegations. Therefore, we hold that the media reports of Stanford's alleged fraud were "public disclosures" within the meaning of the FCA.

II. Is Biddle's action "based upon" public disclosures?

[2] Even though the allegations of Stanford's fraud were publicly disclosed, the district court would not be without jurisdiction unless Biddle's action was "based upon" those public disclosures. Biddle contends that "based upon" means "derived from." Thus, Biddle argues that because he learned first-hand of Stanford's alleged fraud, rather than through the media reports, his action is not based upon the public disclosures.

Biddle relies on a Fourth Circuit case, *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994). In *Siller*, the relator was employed by the defendant's distributor. The distributor filed a suit against the defendant, alleging that the defendant wrongfully terminated its distributorship because the distributor planned to inform the government that the defendant was overcharging the government. Subsequently, the relator filed a *qui tam* suit against the defendant. Although the allegations of overcharging had been publicly disclosed by the distributor's complaint, the relator argued that his action was not based upon the public disclosures because his

complaint was not derived from those disclosures, but rather, from his own personal experience. The Fourth Circuit agreed, holding that "based upon" means "derived from." *Id.* at 1348.

The Fourth Circuit reasoned that the dictionary definition of based upon is to "use as a basis for," which is synonymous with "derived from." *Id.* The Fourth Circuit further reasoned that this construction would still promote the policy of preventing "parasitic" suits because it would disallow a *qui tam* plaintiff from bringing a lawsuit where the allegations were derived from publicly disclosed information. *Id.*

In contrast, Stanford argues that "based upon" means "same as" or "supported by." One of the primary cases upon which Stanford relies is *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). In *Doe*, a corporation was being investigated by the government for alleged fraudulent billing practices. The employee that maintained the false records became a government informant.
The informant assigned to his attorney his rights to bring a *qui tam* action. When the attorney filed his *qui tam* suit, the allegations of fraud had already been publicly disclosed. In holding that the attorney's claim was based upon the disclosures, the Second Circuit stated: "The allegations in his complaint are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit. Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information." *Id.* at 324. The Second Circuit reasoned that a broader construction of "based upon" would result in a flourishing of parasitic suits. *Id.*

[3] Although this circuit has yet to explicitly address the interpretation of "based upon" in the current version of the FCA, our decisions implicitly support Stanford's interpretation. First, in *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), the relator brought a *qui tam* suit against his former employer, alleging that the employer's performance of various defense contracts was defective. Before the relator filed his complaint,

newspaper articles described the defective nature of the defense contracts. Although the district court ruled that the relator's suit was barred because he was not an "original source" of the information, it would not have had to reach the original source issue unless it had already found that the relator's claim was based upon public disclosures of the allegations. We stated:

> It is true that Wang's allegation about the Bradley is supported by a few factual assertions never before publicly disclosed; but "fairly characterized" the allegation repeats what the public already knows: that serious problems existed with the Bradley's transmission. The district court characterized Wang's allegation and most of his information as a rehash of what already had been publicly disclosed. Wang does not dispute this characterization, and it finds support in the record.

Id. at 1417 (citations omitted). This language supports Stanford's view that a claim is "based upon" public disclosure when the claim repeats allegations that have already been disclosed to the public.

In *United States ex rel. Fine v. Chevron*, 72 F.3d 740 (9th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 1877 (1996), the relator supervised and edited audits performed by employees under his supervision. After leaving his job, the relator filed a *qui tam* suit against Chevron alleging fraud against the government. He conceded that he based his claims on reports he furnished to his supervisors, the contents of which were publicly disclosed pursuant to the Inspector General Act. The parties agreed that the allegations satisfied the statutory definition of "based upon public disclosures." *Id.* at 741. Although *Fine* did not directly address the public

disclosure issue,[1] it would have been a different case if "based upon" meant "derived from." The relator's suit was not derived from public disclosures, but rather, from his first-hand knowledge. Yet his suit was "based upon" public disclosures.

Finally, in *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978), this court interpreted 31 U.S.C. § 232(C), the predecessor to § 3730(e)(4)(A), which provided that the court "shall have no jurisdiction to proceed with any such suit . . . whenever it shall appear that such suit was based upon evidence or information in the possession of the United States . . . at the time such suit was brought." *Id.* at 670-71. The relator was an engineer on a project financed by the United States. After observing practices he thought to be fraudulent, the relator informed government officials, which led to two audits of the project. The relator also informed a senator, which resulted in an investigation by the General Accounting Office ("GAO"). Two weeks after the GAO released its report, the relator filed his *qui tam* action. This court upheld the district court's ruling that the relator's suit was barred because it was based upon evidence already known to the government. *Id.* at 673. Thus, although the relator did not derive his suit from evidence in the possession of the government, his claim was based upon such evidence.

When Congress amended the FCA in 1986, the jurisdictional bar was changed from one precluding actions "based upon evidence or information in the possession of the United States" to one precluding actions "based upon the public disclosure of allegations or transactions." However, there is no evidence that Congress intended to change the meaning of "based upon." *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 684-85 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997). Thus, the *Pettis*

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[1] The court expressly limited its holding to whether the relator was an original source. *Id.* at 743.

interpretation of "based upon" remains valid under the current statute.

[4] We differ with the Fourth Circuit's interpretation for several reasons. First, it renders the "original source" requirement largely superfluous. *See Findley*, 105 F.3d at 683. If a relator's lawsuit is based upon public disclosure, then the district court lacks jurisdiction unless the relator is an original source. To be an original source, the relator must have "direct and independent knowledge of the information on which the allegations are based" and must "voluntarily provide[ ] the information to the Government before filing an action." 31 U.S.C. § 3730(e)(4)(B).

> If, however, the relator is permitted to assert that he has "independent" knowledge of the allegations and that, therefore, his action is not "based upon" the public disclosure, then he can successfully avoid the second requirement of the original source provision, namely, that he voluntarily provide the information to the Government prior to bringing an action.

Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Jurisdictional Bar to Qui Tam Actions*, 24 Pub. Cont. L.J. 237, 273 (1995), *cited in Findley*, 105 F.3d at 683. In other words, to say that a relator's complaint is not derived from public disclosures is to say that the relator had direct and independent knowledge of the fraud. Thus, under the *Siller* view, the "based upon" language in § 3730(e)(4)(A) duplicates the "direct and independent knowledge" language in § 3730(e)(4)(B), allowing the relator to avoid the voluntariness requirement in § 3730(e)(4)(B).

[5] Furthermore, the *Siller* interpretation would not further the policies underlying the FCA. Two of the primary purposes of the FCA are to alert the government as early as possible to fraud that is being committed against it and to encourage insiders to come forward with such information where they would otherwise have little incentive to do so. *See* H.R. Rep. No. 99-660, at 22 (1986) ("The purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."); S. Rep. No. 99-345, at 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5279 (stating that the False Claims Act "reward[s] those private individuals who take significant personal risks to bring such wrongdoing to light"); *id.* at 6, reprinted in 1986 U.S.C.C.A.N. 5266, 5271 ("The Committee believes changes are necessary to halt the socalled 'conspiracy of silence' that has allowed fraud against the Government to flourish."); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) (holding that the public disclosure limitation "discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time"). These purposes are accomplished by giving the relator a financial incentive to disclose evidence of fraud. However, where neither of these purposes is implicated in a particular case, the relator should not be so rewarded.

[6] Where the relator brings new information of fraud to the government, the relator should be rewarded regardless of how the relator came into possession of that information. The reason is that the allegations in the complaint, being previously undisclosed, are valuable to the government in remedying the fraud that is being committed against it. On the other hand, where the allegations of the fraud are already public knowledge, the relator confers no additional benefit upon the government by subsequently repeating the fraud allegations in his complaint. The relator should be rewarded only if he was an original source of the information. Insiders who have no

duty to disclose fraud, i.e., who do so voluntarily, should be encouraged to take "significant personal risks to bring such wrongdoing to light," and should be rewarded for doing so.

[7] If we were to accept *Siller*'s interpretation of "based upon" to mean "derived from," Biddle would be permitted to maintain his lawsuit without ever being required to show that he was the original source of the information, for his complaint was not "derived from" the public disclosures. Assuming, without deciding, that Biddle had an obligation to uncover fraud at Stanford, his disclosure of the fraud would not have been voluntary. In such a case, neither of the above two purposes—to provide the government with new information and to encourage persons to come forward who otherwise would not do so—would be furthered by allowing Biddle to bring his *qui tam* lawsuit.

This interpretation is consistent with the statutory structure of the FCA. Under § 3730(e)(4)(A), if the allegations were not previously disclosed to the public, the relator's complaint benefits the government, and the relator is rewarded without inquiring into the details of how the relator obtained the information. If, on the other hand, the allegations in the complaint do not benefit the government because the government already knew about them, then § 3730(e)(4)(A) bars jurisdiction unless the second policy is furthered, that is, an insider provided information to the government who was under no duty to do so.

This interpretation of the FCA is also supported by legislative history.

> Before the relevant information regarding fraud is publicly disclosed through various government hearings, reports and investigations which are specifically identified in the legislation *or through the news media*, any person may file such an action as long as it is filed

> before the government filed an action based upon the same information. *Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action.*

132 Cong. Rec. H9382 (1986) (statement of Rep. Berman) (emphasis added). Furthermore, every circuit court to address this issue, except for the Fourth Circuit in *Siller*, has held similarly. *See United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 855 (1998); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996); *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *Cooper v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562, 567 (11th Cir. 1994); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992).

We, therefore, hold that if at the time a relator files a *qui tam* complaint, the allegations or transactions of the complaint have been publicly disclosed, then the allegations are "based upon" the publicly disclosed information, and the relator must show that he is an original source of the information in order for a district court to have jurisdiction over the lawsuit.

[8] Biddle brought his *qui tam* suit after the allegations of Stanford's fraud were publicly disclosed. Thus, the allegations in Biddle's complaint were "based upon" public disclosures. They did not aid the government, for the government was already aware of the alleged fraud. Accordingly, Biddle should not be rewarded with a potential percentage recovery in a *qui tam* suit unless he is the original source of the information, i.e., he had direct and independent

knowledge of the fraud and he provided the information voluntarily.[2] We now turn to that question.

III. Is Biddle an "original source" under the FCA?

An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). Regarding the "direct and independent knowledge" prong, the district court found, and the parties do not dispute, that Biddle had such knowledge of Stanford's alleged fraud and that he was the source of the government's information. We agree.

The primary disagreement between the parties is whether Biddle came forth voluntarily, or was instead under a duty to expose fraud. The district court found that Biddle did not provide information to the government voluntarily. Although the question of whether Biddle was a volunteer is one of law to be reviewed *de novo*, this court must accept the district court's

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[2] One could argue that this outcome is harsh because, although Biddle's complaint did not reveal new information to the government, Biddle was responsible for publicly disclosing Stanford's alleged fraud in the first place. It must be remembered, however, that Biddle's failure to satisfy the "based upon public disclosure" requirement is not the end of the inquiry. If Biddle were deemed an original source of the information, the district court could assert jurisdiction over his *qui tam* suit. The public disclosure requirement is only the initial inquiry to determine whether the allegations in the relator's complaint provided the government with any valuable information of which it was not already aware. Insiders who come forth voluntarily, and who deserve to be rewarded for doing so, will not be barred merely because their complaints do not reveal any previously undisclosed information.

findings of fact supporting its conclusion of involuntariness unless they are clearly erroneous. *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1472 (9th Cir.) ("*Hagood II*"), *cert. denied*, 117 S. Ct. 175 (1996). Biddle bears the burden of establishing jurisdiction by a preponderance of the evidence. *Id.*

The two primary Ninth Circuit cases to address the issue of voluntariness are *Fine* and *Hagood II*. In *Fine*, the relator was an auditor for the Office of Inspector General. His job required him to supervise audits that other employees had conducted, and edit audit reports that others had written. After leaving his job, the relator filed a ***qui tam*** suit against Chevron alleging fraud against the government. This court held that the relator did not disclose the fraud voluntarily because "[h]e was a salaried government employee, compelled to disclose fraud by the very terms of his employment." *Fine*, 72 F.3d at 743.

In *Hagood II*, the relator was assistant district counsel to the Army Corps of Engineers. He was assigned to represent the district counsel in handling the renegotiation of a certain contract. The relator disclosed the fact that the contract did not comply with the Water Supply Act. This court held that he voluntarily disclosed the information to the government. In distinguishing *Fine*, the court stated:

> This case is not controlled by our recent decision in *[Fine]*, in which we held that an internal government auditor whose job was to expose fraud did not "voluntarily" provide information for the purpose of qualifying as an original source. Hagood's job was not to expose fraud, but to draft contracts and perform other legal services for the Corps.

Hagood II, 81 F.3d at 1476 n.19. ***But see id.*** at 1480 (Kleinfeld, J., concurring) (believing that the relator did not

come forth voluntarily because "a lawyer working on a transaction has a duty as an agent to disclose to his principal 'information relevant to matters within his province and of which he should know the principal would want to know'") (quoting Warren A. Seavey, *Law of Agency* § 143 (1964)).

The present case involves allegations of fraud arising out of two types of contracts: those negotiated while Biddle was employed, and those negotiated before Biddle was hired.

A. Contracts Negotiated While Biddle Was Employed

As stated above, Biddle was the Resident Representative Administrative Contracting Officer ("ACO") for the Office of Naval Research at Stanford. The district court noted that Biddle was not an auditor like the relator in *Fine* whose "paramount responsibility" was to disclose fraud. Rather, auditing is performed by the Defense Contract Audit Agency ("DCAA"). However, the court found that Biddle's job duties "included some aspects of such work." In reaching its conclusion, the district court relied in part on Biddle's job responsibilities as defined in the Federal Acquisition Regulations ("FAR"). Under FAR § 1.602-1, "[c]ontracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings." 48 C.F.R. § 1.602-1(a). "No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met." *Id.* § 1.602-1(b). Moreover, "[c]ontracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, *and safeguarding the interests of the United States in its contractual relationships*." *Id.* § 1.602-2 (emphasis added).

Another section of FAR provides: "If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or

to fraud on the part of the contractor, the contracting officer *shall refer the matter to the agency official responsible for investigating fraud*." *Id.* § 33.209 (emphasis added); *see also* Navy Acquisition Procedures Supplement ("NAPS") § 33.209 (directing ACO to report fraud to Navy Inspector General); 48 C.F.R. § 52.215-5 (permitting ACO to examine and audit contractor's records under certain circumstances).[3]

Finally, the district court supported its conclusion by referring to a report by the Chief of Naval Research. The report stated:

> Some of [Biddle's] key functions are to perform analyses of the universities' indirect cost proposals, conduct fact finding reviews with DCAA and negotiate indirect costs. In addition, he is responsible for negotiating advance agreements, as well as conducting reviews of the university's procurement, property and other business systems to determine whether these systems comply with applicable cost principles and Government procurement regulations/directives.

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[3] Biddle argues that the district court's reliance on § 33.209 of FAR was misplaced in that it applies only to claims for underpayment of government contracts. (Open. Brief at 47). However, "claim" is defined as "a written demand or written assertion [other than a routine request for payment] by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. § 33.201; *see also* 41 U.S.C. § 605 (1987 & Supp. 1997). A "claim" does not have to be in dispute as to liability or amount. *D.L. Braughler Co. v. West*, 127 F.3d 1476, 1483 n.8 (Fed. Cir. 1997).

(Zumwalt Decl. Ex. D. (1-19-91 "Report of Inquiry into Stanford University Overhead Rates" by Chief of Naval Research) at 11).

Biddle argues that the district court erred because he is no different from the relator in *Hagood II*. Despite the regulatory descriptions of his duties, Biddle contends that when he brought his concerns to the attention of his supervisors, he was told: "Remember Paul—you're not a bean counter now, you're an ACO. If DCAA does not advise of us problems with these things, it's not for us to go in and find problems with them." (Biddle Decl. ¶ 11; Opening Brief at 50). Thus, Biddle contends that his job duties did not entail detection of fraud. He further argues that his disclosure of the alleged fraud was necessarily involuntary in light of the opposition exhibited by his superiors. We disagree.

[9] First, Biddle's duties as an ACO are defined by the applicable regulations and other official documentation of his position, as well as the oral statements of his supervisors. Biddle's supervisors may direct him to perform certain specific tasks, but in order to determine his broader responsibilities as an ACO, Biddle must examine the pertinent regulations, such as FAR and NAPS. His documented job responsibilities make it clear that his position entailed more than simply drafting contracts like the relator in *Hagood II*; Biddle had a duty as an ACO to disclose fraud. As discussed above, FAR and NAPS obligated Biddle to ensure the legitimacy of contracts and to refer possible fraud to the appropriate authorities. If Biddle's argument were taken to its logical extreme, the relator in *Fine*, who was an auditor for the Inspector General, could have maintained that he had no duty to uncover fraud if his superiors had obstructed his ability to conduct certain audits. The documented responsibilities of a government employee cannot be so easily ignored.

[10] Nor does the fact that Biddle met resistance by his superiors transform his unearthing of possible fraud into a voluntary investigation. The purposes underlying the FCA are

to encourage individuals to report potential fraudulent activities being committed against the government, and to reward them for doing so. But where a government employee is paid to perform this function, the employee should not receive a windfall for merely doing his job. Biddle earned a government salary to perform various tasks, one of which was to report suspected fraud to his superiors. Thus, he was a "salaried government employee, compelled to disclose fraud by the very terms of his employment." *Fine*, 72 F.3d at 743. This was true in *Fine*, even though Fine's superiors "could not or would not take action against every perceived violation he brought to their attention." *Id.* at 742. Uncovering fraud is a formidable task, especially when one's supervisors may be opposed, uninterested, or even involved in the fraud. But in accepting the position as ACO, Biddle assumed the risk of encountering such a difficult situation. Why should he now receive a possible windfall for simply doing that which he was required to do and was paid to do?

[11] Furthermore, as the *Fine* court recognized, by allowing Biddle potentially to recover a substantial amount of money in a *qui tam* action, we would be creating "perverse incentives" for similarly-situated government employees. *See id.* at 745. Rather than perform their jobs as they are required, government employees obligated to disclose suspected fraud may inappropriately hide fraud from their supervisors while preparing their *qui tam* actions for filing. *Id.* Moreover, by racing the government to the courthouse in order to secure personal financial gain, a relator may prematurely alert the target before the government has sufficient time fully to investigate the alleged fraud, thereby frustrating a future case against the target. *Id.* These policy concerns further bolster our view that Biddle did not voluntarily provide information through his *qui tam* complaint.

[12] In determining whether Biddle came forth voluntarily, the district court examined the pertinent

regulations and other official documentation of Biddle's responsibilities as an ACO. The court then concluded:

> As a contracting officer, plaintiff clearly had a duty to ensure that those claims he reviewed, the indirect cost proposals he analyzed, [and] the indirect cost rates and advance agreements . . . he negotiated were adequately supported. Moreover, it was his duty to refer suspected fraudulent claims to the appropriate investigatory authority.

Upon reviewing the evidence relied upon by the district court, we believe that the court's above findings are not clearly erroneous. Based on those findings, we hold that Biddle did not voluntarily disclose the alleged fraud regarding the contracts that were negotiated while he was employed as an ACO.

B. Contracts Negotiated Before Biddle Was Hired

[13] Biddle was hired as ACO in October of 1988. His complaint, however, alleges fraud committed by Stanford in contracts dating back to 1981. Biddle argues that even if he had a duty to disclose fraud regarding contracts that were negotiated while he was employed as an ACO, he had no such duty with respect to contracts negotiated before he was hired. Although the district court stated that this issue presented a "closer question," it ultimately rejected Biddle's argument.

The court relied in part on a June 2, 1991 memo by Biddle that stated that his "current taskings" included coordination and assistance to DCAA in the conduct of audits of indirect costs and staff benefits for the years 1981-1991. Biddle argues that his tasks were expanded after he disclosed Stanford's alleged fraud. Therefore, he asserts that the court should not have considered this document, or any other document defining his duties that was issued after he initially

disclosed the alleged fraud. He argues that otherwise the government could stifle *qui tam* suits by merely enlarging a relator's job duties after initial disclosure so that further disclosure is involuntary.

[14] Even if Biddle's argument has merit, there was sufficient evidence apart from this memo to find that Biddle had a duty to disclose fraud relating to any contract. First, under FAR and NAPS, as discussed above, Biddle was required to safeguard the interests of the United States and report fraud to the Navy Inspector General. These requirements do not appear to limit Biddle's duties to contracts negotiated while he was employed as an ACO. Furthermore, the district court found that in analyzing Stanford's cost proposals, negotiating rates, and evaluating compliance during his term as ACO, Biddle had to consider overhead rates for previous years. One of the main allegations in Biddle's complaint was that Stanford was claiming and obtaining excess reimbursement for indirect costs based on contracts negotiated before Biddle was hired. These contracts were still in effect, and allegedly being abused by Stanford, throughout Biddle's tenure. Upon discovering possible fraud with respect to these on-going contracts, Biddle was under an obligation to disclose it.[4]

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[4] An additional issue brought up by the parties is the effect of Executive Order No. 12,674, which provides, in pertinent part: "Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities." 54 Fed. Reg. 15,159, § 101(k) (1989). The question is whether the order prevents a federal employee from being an original source. This issue was raised in *Fine*, 72 F.3d at 744, but the court declined to address it because it found that the relator had a specific job duty to disclose fraud as an auditor for the Office of Inspector General. Nor was the question answered in *Hagood II*. The fraud alleged by the relator in that case occurred prior to 1989, the year the Executive Order became effective. *See United States ex rel. Hagood v. Sonoma County*

Upon reviewing the evidence relied upon by the district court, we hold that the court's findings are not clearly erroneous. Based on those findings, we hold that Biddle did not voluntarily disclose the alleged fraud regarding the contracts that were negotiated before he was hired. Accordingly, Biddle was not an "original source" of the information that he disclosed to the government, and the district court lacked subject matter jurisdiction over his *qui tam* action.

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

The question of whether Biddle's disclosure was voluntary is difficult, and were it not for *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996), I would not dissent. But the petition for rehearing persuades me that *Hagood* cannot properly be distinguished from our decision in the case at bar.

In *Hagood*, we held that an attorney employed by the Army Corps of Engineers was an original source, despite his fiduciary responsibility as an attorney to disclose to his superiors what he thought the law required. In *Hagood*, we distinguished *United States ex rel. Fine v. Chevron*, 72 F.3d 740 (9th Cir. 1995), on the ground that "Hagood's job was not to expose fraud, but to draft contracts and perform other legal services for the Corps." I did not agree, because in my view a lawyer cannot be a mere scrivener, and by reason of his employment as a lawyer has a fiduciary responsibility to give

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Water Agency, 929 F.2d 1416 (9th Cir. 1991) ("*Hagood II*"). Because we hold that the regulations defining Biddle's job responsibilities rendered his disclosure involuntary, we need not reach this question.

his client his honest opinion, and may not knowingly assist in committing a fraud. *Hagood*, 81 F.3d at 1479 (Kleinfeld, J., concurring). But the majority's view in *Hagood*, not mine, is the law.

Biddle thought Stanford's lavish spending on what it considered overhead violated its contract terms. He duly reported what he thought were violations of contract specifications to his superiors. But they did not act on his reports. Instead they told him "You're not a bean counter now, you're an ACO." That meant, in context, that in his superiors' view, further reports of what he regarded as contract violations were not his job. Up to where he was told that further such reports were not his job, I agree with the majority that Biddle made no voluntary disclosure, and was just doing the job he was getting paid for.

But then Biddle did something that was not his job. He continued to do the audits he had been told were not his job, told a committee of Congress what he had found, and triggered an investigation. The investigation bore fruit. Biddle wants his slice of the fruit, under the qui tam act. I think he voluntarily made the disclosure to Congress, so is entitled to be treated as an original source for purposes of the statute.

The regulation upon which the majority relies says that Biddle was to ensure compliance with the terms of contract, "safeguarding the interests of the United States." 48 C.F.R. § 1.602-1(a). I do not see how this regulation took away the voluntariness of Biddle's report to Congress of Stanford University's wrongdoing, when in *Hagood* a Corps of Engineers lawyer's duty to tell the United States as his client that the cost allocation in a contract he was drawing up was fraudulent did not.

Does *Biddle* mean that no government employee can recover in a qui tam case? We noted in *Fine* that an executive order obligates all government employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities." *Fine*,

72 F.3d at 744; see Executive Order No. 12, 674, 54 Fed. Reg. 15,159, at § 101(k) (1989). That executive order is considerably clearer in obligating employees to report fraud than the regulation we rely on in the case at bar, so if the regulation in the case at bar eliminates voluntariness, it would seem to follow *a fortiori* that the executive order cited in *Fine* eliminates voluntariness for all government employees.

We did not rest on the regulation in *Fine*, and the petition for rehearing in the case at bar points out the significance to our *Fine* decision of the fact that Fine's "paramount" responsibility was ferreting out fraud. Also, as Judge Kozinski noted in his *Fine* concurrence, Inspector General employees have special protection from chain of command pressures. *Fine*, 72 F.3d 746-47.

There is something to be said in favor of a very restrictive construction of "voluntary disclosure" for government employees. It will not do to have government employees save up fraud information they discover using their government power to enrich their retirements. But it is hard to conclude that a government employee's duty of voluntary disclosure to appropriate authorities includes going over his boss's head to a Congressional committee, and it is hard to reconcile so restrictive a construction with our own precedents, particularly *Hagood*.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel., BIDDLE,	) No. C-91-20618 RMW
Plaintiff,	) ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; DENYING DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY; AND GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S THIRD CLAIM FOR RELIEF FOR FAILURE TO STATE A CLAIM
v.	
BOARD OF TRUSTEES OF THE LELAND STANFORD, JR. UNIVERSITY,	
Defendant.	
	) Filed: 8/26/96

Defendant Board of Trustees of the Leland Stanford, Jr. University's ("Stanford") motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("FRCP") for lack of subject matter jurisdiction and its motion to dismiss pursuant to Rules 8, 9(b), 10, 12(b)(6) and 41(b) for failure to plead fraud with particularity and failure to state a claim were submitted on August 9, 1996. The court has read the moving and responding papers and heard the oral argument of counsel. For the reasons set forth below, the court grants defendant's motion to dismiss for lack of subject matter jurisdiction, denies defendant's motion to dismiss for failure to

plead fraud with particularity, and grants defendant's motion to dismiss plaintiff's third claim for relief for failure to state a claim.

I. BACKGROUND

On July 21, 1995, oral arguments were heard on defendant's motion to dismiss plaintiff's second amended complaint. On July 27, 1995, the court granted defendant's motion to dismiss with respect to plaintiff's third cause of action brought under 31 U.S.C. section 3729(a)(3) because the conduct about which plaintiff complained was "directed toward the resolution of a dispute, not the allowance or payment of a false or fraudulent claim" within the meaning of section 3729(a)(3). The court further found that although plaintiff had argued in his opposition that defendant had directly violated section 3729(a)(7), he had failed to plead such a violation. The court, therefore, allowed plaintiff leave to amend his complaint.

On August 11, 1995, the court withheld its ruling on defendant's motion to dismiss the first and second causes of action in plaintiff's second amended complaint pending plaintiff's provision of supplemental materials to support those causes of action. In furtherance of this, the court ordered defendant to deliver to plaintiff copies of invoices and vouchers within defendant's possession from fiscal years 1981 through 1992 which were submitted by defendant to the United States Government ("Government") in connection with Government sponsored research agreements.

On August 30, 1995, plaintiff filed a third amended complaint in which he amended all three causes of action within his second amended complaint.

Defendant filed a motion to dismiss plaintiff's third amended complaint on procedural grounds pursuant to Rule 41(b) alleging that plaintiff violated Rule 15(a) as well as both the letter and spirit of the court's July 27, 1995 and

August 11, 1995 orders by filing an unauthorized third amended complaint. Defendant reserved the right to "raise substantive violations of Federal Rules of Civil Procedure 8, 9 and 10 when it is appropriate to address the merits of plaintiff's complaint." After hearing on the motion, defendant agreed to accept the third amended complaint as the operative complaint and to direct its sufficiency challenges at it.

Defendant now seeks dismissal of this action for lack of subject matter jurisdiction, for failure to plead fraud with particularity and for failure to state a claim.

II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

A. Legal Standard

Before the court may reach the merits of plaintiff's claims, it must first consider whether it has subject matter jurisdiction over them. Price v. United States General Services Admin., 894 F.2d 323, 324 (9th Cir. 1990). In making its determination, the court may resolve factual disputes based on the evidence presented where the jurisdictional issue is separable from the merits of the case. Rosales v. U.S., 824 F.2d 799, 803 (9th Cir. 1987). In such cases, no presumption of truthfulness attaches to plaintiff's allegations. Id. "However, if the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question is dependent on factual issues going to the merits, the district court should employ the standard applicable to a motion for summary judgment and grant the motion to dismiss for lack of subject matter jurisdiction only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." Id.

31 U.S.C. section 3730(e) "circumscribes the power of courts to hear qui tam suits." Wang v. FMC Corp., 975 F.2d 1412, 1415 (9th Cir. 1992) ("Wang"). Section 3730(e)(4), the subsection pertinent to this action, provides:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

"Where an allegation has been publicly disclosed within the meaning of section 3730(e)(4)(A), a plaintiff may only bring a qui tam suit if he can show that (1) he has 'direct and independent knowledge of the information on which his allegation is based'; and (2) that he 'has voluntarily provided the information to the Government before filing' his qui tam action" i.e., that he is an original source. Wang at 1417. "Only two Ninth Circuit cases address the question of what constitutes 'direct and independent' knowledge for purposes of § 3730(e)(4). In both cases, [the Ninth Circuit] held that the relator had 'direct and independent' knowledge because he had discovered the information underlying his allegations of wrongdoing through his own labor."[1] United States ex rel. Devlin v. State of California, 84 F.3d 358, 360-61 (9th Cir. 1996) ("Devlin"). A panel of the Ninth Circuit in United States ex rel. Fine v. Chevron, 39 F.3d 957 (9th Cir. 1994),

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[1] Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) and United States ex rel. Barajas v. Northrop Corp., 5 F.3d 407 (9th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1543 (1994).

similarly held that an auditor-relator had direct and independent knowledge of the information underlying his *qui tam* action because his own labor - reviewing audit sheets and other financial records - led to his discovery of the allegedly fraudulent payments. Id. at 961-62. The en banc court that reheard the case and vacated the panel opinion did not reach the question of whether Fine's knowledge was direct and independent because it held that Fine's failure of the "voluntary" prong of the original source test was dispositive.[2] United States ex rel. Fine v. Chevron, 72 F.3d 740, 741 n.1, 743 (9th Cir. 1995) ("Fine").

In addition to having "direct and independent" knowledge, an original source must also voluntarily provide the information forming the basis of the claim to the government prior to filing suit. Fine, 72 F.3d at 741. In Fine, the Ninth Circuit held that the relator, an auditor for the Office of the Inspector General, was not a volunteer since as an auditor the "paramount responsibility of his position" was "the duty to disclose fraud to his supervisors." Id. at 742-43. However, since all federal government employees have a duty to "disclose waste, fraud, abuse, and corruption to appropriate authorities" pursuant to Executive Order No. 12,674, 54 Fed. Reg. 15,159, at § 101(k) (1989), the Fine decision left open

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[2] Before passing on the question of whether an auditor for the Office of Inspector General could have "direct and independent knowledge," the en banc court noted two decisions by other courts on point which found they could not. "See United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 499 U.S. 921 (1991) (reasoning that the 'fruits of [the auditor's] effort belong to his employer,' so he could not have 'independent knowledge' of the information); United States ex rel. Fine v. MK-Ferguson Co., 861 F. Supp. 1544, 1554 (D.N.M. 1994) (holding that Harold Fine did not have direct and independent knowledge because he did not personally conduct the audits that let to the public disclosures)." Fine, 72 F.2d at 743.

the question "whether federal employees might be excluded as a class from qualifying as original sources." Fine, 72 F.3d at 744 n.5. The gap has been answered, at least in part, by the Ninth Circuit's decision in Hagood v. Sonoma County Water Agency, 81 F.3d 1465 (9th Cir. 1996) ("Hagood"), in which the court implicitly held federal employees as a class are not so barred by holding that an Assistant District Counsel in the Army Corps of Engineers met both prongs of the original source test, direct and independent knowledge and voluntary disclosure to the government, because unlike Fine, whose job as an internal government auditor was to expose fraud, Hagood's job "was not to expose fraud, but to draft contracts and perform other legal services for the Corps." Id. at 1476 & n.19.

B. Discussion

As a threshold matter, the court finds that the determination of the jurisdictional issue of whether plaintiff's action is barred by 31 U.S.C. section 3730(e)(4), i.e. whether plaintiff's claims are based upon the public disclosure of allegations or transactions in the requisite forum and if so, if plaintiff is the original source of such information, can be made without reaching the merits of plaintiff's claims against Stanford. The court may, therefore, resolve factual issues in making its subject matter jurisdiction determination.

It is clear from the numerous newspaper and magazine articles, the transcript of a television program, records of congressional hearings and an administrative investigative report that plaintiff's allegations, fairly characterized, repeat what the public already knows: that Stanford is alleged to have fraudulently overbilled the Government substantial amounts as a result of alleged problems in its computations of recoverable indirect costs. Therefore, plaintiff must qualify as an original source for this court to have subject matter jurisdiction over his qui tam claims. See Wang at 1417. To do so, plaintiff must show that (1) he has direct and independent knowledge of the information on which his allegation is based;

and (2) that he has voluntarily provided the information to the Government before filing his qui tam action. Id. Plaintiff clearly has the requisite direct and independent knowledge. Many of the articles containing the public disclosures of the allegations in this action specifically mention plaintiff as the whistleblower or instigator. Moreover, during the congressional hearings before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, Congressman Dingell similarly recognized plaintiff's role in discovering and bringing to light the allegations against Stanford.

> The Subcommittee investigation began when it received allegations of substantial overcharging at Stanford. In checking into these allegations we learned that Mr. Paul Biddle, the Navy's administrative contracting officer at Stanford, it turned out, had been fighting an extraordinarily lonely battle for months with his own intransigent Navy bureaucracy to expose a situation at Stanford which was very clearly out of control. Mr. Biddle deserves enormous credit for exposing not only the situation at Stanford, which I believe will save the taxpayers tens of millions of dollars, but for exposing problems which I am confident will lead to similar savings across the country at other institutions.

It cannot, therefore, be seriously disputed that plaintiff "caused, triggered or instigated any public disclosures and the investigations that prompted any public disclosures," and that plaintiff has direct and independent knowledge of the information underlying such allegations from his review of various claims, supporting records and statements submitted by Stanford.[3] The inquiry, however, does not end here. Plaintiff

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[3] Although it is not entirely clear, after the en banc decision in Fine, whether a plaintiff who fails the "volunteer" requirement for being an original source due to his job responsibilities can have direct and independent knowledge of

must also show that he voluntarily disclosed the allegations to the government prior to bringing his qui tam action. There is no dispute plaintiff disclosed the information to the government prior to bringing this action. However, the parties do dispute whether plaintiff could voluntarily do so considering his job responsibilities. From October 1988 until March 1992, plaintiff was the Resident Representative Administrative Contracting Officer for the Office of Naval Research at Stanford ("ONRRR Stanford"). As such, he was responsible for the negotiation, administration and settlement of various contracts for Government-sponsored research at Stanford. Specifically, the standard position description for plaintiff's position includes as some of its key functions "to perform analyses of the universities' indirect cost proposals, conduct fact finding reviews with DCAA [Defense Contract Audit Agency] and negotiate indirect cost rates. In addition, he [was] responsible for negotiating advance agreements [memoranda of understanding or MOUs], as well as conducting reviews of the university's procurement, property and other business systems to determine whether these systems comply with applicable cost principles and Government procurement regulations/directives." Zumwalt Decl. Ex. D (1-19-91 "Report of Inquiry into Stanford University Overhead Rates" by Chief of Naval Research) at 11. Plaintiff's job responsibilities can also be found in governing Federal Acquisition Regulations ("FAR") and the Navy Acquisition Procedures Supplement ("NAPS"). FAR 1.602-1(a) provides that "[c]ontracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings" and FAR 1.602-1(b) provides that "[n]o contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including

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the information on which his allegations are based, the court finds the reasoning of existing Ninth Circuit authority to support such a finding in this case.

clearances and approvals, have been met." NAPS provides that contracting officers have a responsibility to review claims presented for approval for adequate support and are required to refer to the appropriate agency official for investigating fraud those claims which the contracting officer suspects lacks such support due to misrepresentation of fact or to fraud on the part of the contractor. 48 C.F.R. 33.209.

Defendant argues that in light of the FAR and NAPS regulations, plaintiff had a duty to disclose fraud and therefore, like the relator in Fine, does not qualify as an original source because he is not a volunteer. Plaintiff, on the other hand, argues that he had no responsibility for finding and disclosing fraud. He argues he was a contracting officer not an auditor and, like the relator in Hagood, he satisfies the volunteer prong of the original source test.

Although plaintiff was not an auditor with the DCAA, like Fine, whose "paramount responsibility" was generally to investigate completed transactions, i.e. historical information, for fraud, plaintiff's job duties included some aspects of such work. As a contracting officer, plaintiff clearly had a duty to ensure that those claims he reviewed, the indirect cost proposals he analyzed, the indirect cost rates and advance agreements [memoranda of understanding or MOUs] he negotiated were adequately supported. Moreover, it was his duty to refer suspected fraudulent claims to the appropriate investigatory authority.[4] Therefore, plaintiff was clearly operating under compulsion of the directives of his job in disclosing suspected fraud in claims and negotiations he handled during his term as the ONRRR Stanford.

The closer question, however, is whether plaintiff was a volunteer with respect to his investigation and disclosure of

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[4] To find otherwise, would create an incentive for contracting officers to approve claims, knowing they were false or fraudulent, so a later qui tam action could be brought.

alleged fraud in connection with claims paid and indirect cost rates negotiated prior to his becoming the ONRRR Stanford. The court concludes he was not. First, plaintiff's job duties included "conducting fact finding reviews with DCAA." Zumwalt Decl. Ex. D at 11. In a memo dated June 2, 1991, plaintiff Biddle acknowledged that his "current taskings" included coordination and assistance to DCAA in the conduct of audits of indirect costs and staff benefits for the years 1981-1991, the two areas in which plaintiff alleges in his complaint that Stanford submitted false claims to the Government. Dunkley Decl. Ex. 10. Additional documentation issued prior to plaintiff's filing of his qui tam complaint in September of 1991 that both plaintiff and his superior considered the task of reviewing what Stanford had been paid from FY 1981 forward to be within plaintiff's job assignments was also offered. See Dunkley Decl. Ex. 4, 8, 9 and 11; Zumwalt Decl. Ex. D. Furthermore, in analyzing Stanford's cost proposals, negotiating rates and evaluating compliance during his term as ONRRR Stanford, plaintiff necessarily had to consider overhead rates for previous years. One of the main issues underlying plaintiff's allegations of fraud is that Stanford allegedly claimed and obtained excess reimbursement for indirect costs because it was allocating indirect costs to Government research projects based on negotiated MOUs, all of which appear from the record to have been negotiated prior to plaintiff's term as ONRRR Stanford though still in effect during his term, rather than the standard allocation methods provided by Office of Management and Budget ("OMB") Circular A-21. Therefore, plaintiff's suspicion that the MOUs underlying the claims he reviewed and the indirect cost rates and pricing agreements he negotiated contained fraudulent claims and his mandatory responsibility to report such suspicion necessarily implicated not only the claims and rates plaintiff handled but also those prior claims and rates which were derived from the same MOUs.

The court concludes, therefore, that plaintiff was not a volunteer but rather was performing work called for by his job

duties and assignments. Consequently, plaintiff is not a proper qui tam plaintiff and the court lacks subject matter jurisdiction over this action.

III. MOTION TO DISMISS FOR FAILURE TO PLEAD FRAUD WITH PARTICULARITY

A. Legal Standard

Generally, the federal pleading rules require a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ.P.8(a). Each averment of a pleading shall be simple, concise and direct, so as to give defendants "fair notice" of the claim being asserted and the "grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 48 (1957); Fed. Rule Civ.P.8(e)(1).

Allegations of fraud, however, are subject to a heightened requirement of particularity. Fed. Rule Civ.P.9(b). The "'allegations of fraud [must be] specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993) (quoting Smegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)). The particularity requirement is met if plaintiff provides sufficient evidentiary facts to identify the statements or transactions at issue and explains why such statements or transactions are false or misleading. See In re Glenfed, Inc. Securities Litigation, 42 F.3d 1541, 1548 (9th Cir. 1994).

"A district court may [also] dismiss an action if the plaintiff fails to prosecute his or her case, fails to comply with the applicable rules of procedure, or fails to abide by a court order." Fed. R. Civ. P. Rule 41(b); Johnson v. U.S. Dept. of Treasury, 939 F.2d 820, 825 (9th Cir. 1991). Dismissal, however, is a harsh penalty and is to be imposed only in extreme circumstances. Raiford v. Pounds, 640 F.2d 944, 945 (9th Cir. 1981).

B. Discussion

The court need not address this issue since it has found subject matter jurisdiction lacking. However, the court will rule on the question since it was brought before the court at the same time as the jurisdictional question.

Defendant contends that plaintiff has still failed to plead fraud with particularity. During the July 21, 1995 hearing on defendant's earlier motion to dismiss for failure to plead fraud with particularity, the court expressed concern that as plaintiff's complaint stood at that time there was no way to tell what specifically on a particular invoice was claimed to be false. The court also noted, however, that it was "not saying that [plaintiff has] to have every precise detail" but he should be able to tell the court and defendant what is false and show that he has a good faith basis for a fraud claim. In its order of August 11, 1995, the court ordered Stanford to provide to plaintiff the invoices in its possession and ordered plaintiff to "make a packet and provide it to Stanford, with a copy to [the court], that takes each invoice, highlights what's on it that's false . . . [a]nd then on a separate sheet, . . . say[s] why the particular request for payment is false." Plaintiff states that Stanford produced more than 42,000 pages of claims, which allegedly include 100% of the claims for fiscal years 1988 to 1992 and 50% of the claims for fiscal years 1981 to 1987. Plaintiff then reviewed each of these and provided the court and Stanford with a master summary of the amounts which are alleged to be false and an explanation why they are so. The court has reviewed plaintiff's submission and his third amended complaint and finds that plaintiff has sufficiently alleged fraud in accordance with Rule 9(b). The court also does not find that extreme circumstances exist justifying dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Legal Standard

The court may dismiss a complaint as a matter of law for either of two reasons: (1) lack of a cognizable legal theory, or (2) the pleading of insufficient facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533 (9th Cir. 1984) (citations omitted). In ruling on a motion to dismiss, district courts must accept all material allegations of fact alleged in the complaint as true and resolve all doubts in favor of the plaintiff. Blake v. Dierdorff, 856 F.2d 1365, 1368 (9th Cir. 1988). The court, however, need not accept legal conclusions asserted in the complaint even if pled as "facts." Papasan v. Allain, 478 U.S. 265, 286 (1986). The court is to grant the motion to dismiss if it appears that plaintiffs can prove no set of facts which would entitle plaintiffs to relief. Sun Savings & Loan Assoc. v. Dierdorff, 825 F.2d 187, 191 (9th Cir. 1987).

In evaluating a Rule 12(b)(6) motion to dismiss, the court may consider documents whose contents are alleged in a complaint and whose authenticity no party questions, even though they are not physically attached to the pleading. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994).

B. Discussion

Defendant also seeks dismissal of plaintiff's third claim for relief in his third amended complaint for failure to state a claim. In that claim, plaintiff alleges that defendant "made and used false statements and records to conceal, avoid and decrease its obligations to the Government by entering into an October 17, 1994 'Settlement Agreement' with ONR [Office of Naval Research] and by collaborating with ONR on the language of related press releases that purported falsely to exonerate Stanford for $230 million in false and fraudulent claims made by Stanford from FY 1981 to FY 1990." 3d Am.

Compl. ("TAC") ¶ 229. Plaintiff alleges that Stanford drafted and executed the Settlement Agreement in which it was falsely asserted that the ONR was authorized to enter into the agreement on behalf of all government agencies which sponsor agreements with Stanford, that it settled all issues between the ONR and Stanford for the years 1981 to 1992, that its MOUs were valid and binding agreements with the Government and that the ONR concluded it had no claim of wrongdoing against Stanford. Plaintiff argues, however, that the ONR was not empowered to enter into such a Settlement Agreement on behalf of all agencies for all claims. Moreover, plaintiff contends that since no claims for 1981 to 1990 were asserted at the time of the Settlement Agreement, such claims could not have been included within it. Furthermore, plaintiff argues that since the ONR had evidence that the MOUs were invalid and, through the DCAA, knew that Stanford had allegedly overbilled the Government $230 million, the ONR knew it had valid claims against Stanford for fraud, misrepresentation or other wrongdoing contrary to the representation included in the Settlement Agreement. Plaintiff therefore concludes that the representations made in the Settlement Agreement were false statements made by Stanford to conceal its obligation to repay the Government. Plaintiff also argues that Stanford repeated these allegedly false statements in its press release and collaborated and approved the ONR's press releases to the same effect.

31 U.S.C. section 3729(a)(7) provides that any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government" is liable to the Government for damages. Defendant argues that the statements upon which plaintiff's third claim for relief rests did not cause any loss to the Government. Rather, any loss that may have occurred resulted from the Settlement Agreement. Plaintiff, however, argues that defendant's statements conceal its obligation to repay the Government, which is all that is required by the statute.

Plaintiff's allegations of false statements fall into three groups. First, the statements contained in the Settlement Agreement; second, Stanford's press releases reporting the same alleged false statements; and third, Stanford's collaboration and approval of the ONR's press release which reported the same alleged false statements. The court fails to see how either the statements made in Stanford's press releases or its involvement in approving the ONR's press release, all of which merely reported, apparently accurately, excerpts from the Settlement Agreement, fall within the purview of section 3729(a)(7). Moreover, the court does not believe that plaintiff's allegations with respect to the false statements allegedly recited in the Settlement Agreement fall within the contemplation of section 3729(a)(7). Plaintiff does not appear to allege that Stanford made the false statement to obtain the Settlement Agreement. In fact, plaintiff argues that the Government was aware at the time of executing the Settlement Agreement that the statements at issue which were recited in the Settlement Agreement were false. Therefore, it does not appear that these allegedly false statements acted to conceal anything from the Government which is what section 3729(a)(7) seeks to prevent. The court thus finds that plaintiff has failed to state a claim under section 3729(a)(7) and consequently, grants defendant's motion to dismiss.

V. ORDER

For the foregoing reasons, the court orders that:

1. Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

2. Defendant's motion to dismiss for failure to plead fraud with particularity is denied.

3. Defendant's motion to dismiss plaintiff's third claim for relief for failure to state a claim is granted.

DATED: 8/26/96

RONALD M. WHYTE
United States District Judge

STATUTORY PROVISIONS

Title 31 U.S.C. § 3730(e) provides:

(e) Certain actions barred.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has

voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Supreme Court, U.S.
FILED
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No. 98-1268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA,
ex rel., PAUL BIDDLE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE LELAND
STANFORD, JR. UNIVERSITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The fundamental premise underlying the petition — that there is ongoing disagreement among the circuits as to the interpretation of the term "based upon" in the False Claims Act — is wrong. But for the now repudiated decision in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), there is no disagreement among the circuits.

The petition's remaining argument challenges the district court's finding, upheld by the Court of Appeals, that petitioner was compelled by his job duties to disclose fraud and therefore his disclosure was not voluntary. The petition ignores the "clearly erroneous" standard of review and simply reargues the evidence.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner Paul Biddle, while a contracting officer with the Office of Naval Research ("ONR"), commenced this *qui tam* action against Stanford pursuant to the False Claims Act on September 9, 1991. Court Record ("CR") 1. In that complaint, Biddle alleged that the Board of Trustees of the Leland Stanford Junior University ("Stanford"), violated the False Claims Act by submitting false claims for overhead or "indirect costs" under sponsored research agreements between Stanford and the federal government during the period 1981 through 1990. CR 1.

After the complaint was filed, the Department of Justice conducted an exhaustive two-year investigation in consultation with Biddle. At the conclusion of the investigation, in December 1993, the United States declined to intervene and prosecute this action. CR 42.

The subject of the appeal below was Biddle's Third Amended Complaint. Stanford filed a motion to dismiss the Third Amended Complaint on the ground that the district court lacked subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). Appellant 's Excerpts of Record ("ER") 194 and 225. On August 26, 1996, the district court entered an order dismissing Biddle's complaint on the ground that it lacked subject matter jurisdiction. ER 267. The district court found, pursuant to section 3730(e)(4) of the False Claims Act, that:

> 1. The allegations of fraud in Biddle's complaint had been publicly disclosed prior to the filing of his complaint.
>
> 2. Biddle's complaint was "based upon" those public disclosures.
>
> 3. Biddle's disclosure to the government was compelled by his job duties and therefore not "voluntary" within the terms of section 3730(e)(4)(B) of the False Claims Act.

ER 267.

B. Factual Background

1. *Stanford's agreements with the government.*

Federal government agencies regularly enter into agreements with Stanford and other universities for research and other activities to be performed by those universities.

Because these agreements require universities to commit a substantial amount of their resources, the agreements are

designed to reimburse the universities for not only the direct research costs, but also related costs. CR 126, p. 2. Thus, the agreements reimburse universities for three kinds of costs: (1) direct costs (such as the researchers' salaries and supplies used for a particular research project); (2) indirect costs (a share of the "overhead," such as the costs of buildings, equipment, utilities and administrative support); and (3) staff benefits (such as health insurance and social security taxes). CR 126, p. 2.

One federal agency, the Office of Naval Research, is responsible for setting the indirect cost rates and staff benefits rate at Stanford, which are applied to all government-sponsored agreements. CR 126, p. 2. Office of Management and Budget ("OMB") Circular A-21 contains regulations governing the calculation of indirect costs and staff benefits. CR 126, pp. 2-3. OMB Circular A-21 prescribes default methods for calculating components of the indirect cost rate, but also recognizes that the default methodology may not accurately reflect the true overhead cost for a particular university. ER 226, Ex. D, pp. 1-8. Thus, OMB Circular A-21 allows universities to develop alternative methodologies pursuant to requirements set forth in OMB Circular A-21 to reflect more accurately their indirect costs.

Stanford and ONR entered into a series of agreements in the 1980s which mandated in advance the cost accounting methodologies, including the alternative methods, to be used in calculating Stanford's indirect costs, fringe benefits and direct costs under OMB Circular A-21. CR 126, p. 3. These bilateral agreements, which are specifically encouraged by OMB Circular A-21, were called Memoranda of Understanding or "MOUs." CR 126, p. 3. Most of the alleged

overcharges complained of by Biddle were specifically allowed under the MOUs. CR 126, p. 3.

2. *The government's vindication of Stanford.*

Stanford has repeatedly been vindicated by the government regarding Biddle's allegations of fraud.

After an exhaustive two-year investigation, the Department of Justice refused to intervene in Biddle's action. The Navy dropped its criminal investigation of this matter (CR 42); the Office of Chief of Naval Research ("OCNR") Inspector General did not find any fraud or improper relationship between Stanford and ONR, as Biddle had alleged (ER 226, Ex. D); and the Defense Contracting Audit Agency ("DCAA") audited Stanford's indirect rates for the years in question and did not find any fraud. CR 1, Ex. C. Finally, in October 1994, the government settled all contractual disputes with Stanford for fiscal years 1981 through 1992. ER 226, Ex. B at BS 1426-31.

At that time, the Navy publicly announced that it did "not have a claim that Stanford engaged in fraud, misrepresentation, or other wrongdoing" with respect to the matters alleged in Biddle's complaint and "determined that the memoranda of understanding for the years in question were valid and binding agreements between the Government and Stanford." *Id.*

3. *Biddle's job responsibilities.*

In October 1988, Biddle assumed responsibility as an Administrative Contracting Officer ("ACO") for the Office of Naval Research and its Resident Representative at

Stanford. ER 194 ¶ 7. When Biddle commenced his job duties, he took the position that the audit and negotiation process had not been completed for any year dating back to 1981. Thus, each year from 1981 forward was deemed an "open year" for which Biddle had the responsibility to resolve and close out. ER 261, Ex. 10.

Biddle 's job responsibilities as a contracting officer were, in part, defined by Federal Acquisition Regulation ("FAR"), which provides that the contracting officer "ensures . . . that all requirements of law" have been met (FAR 1.602-1(b)) and that:

> Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and *safeguarding the interests of the United States in its contractual relationships*. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall —
>
> . . . .
>
> (c) Request and consider the advice of specialists in audit, law, engineering, transportation, and other fields, as appropriate.

FAR 1.602-2, ER 261, Ex. 22 (emphasis supplied). Other published federal regulations also prescribe Biddle's job duties. For example, the Navy Acquisition Procedures Supplement ("NAPS") 33.209 requires that:

> When there is evidence that the inability to support any part of a claim is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the Navy Inspector General for review or the conducting of an investigation, as appropriate.

48 C.F.R. 33.209, ER 261, Ex. 13.

Biddle was aware of the above regulations and understood that his job responsibilities required him to ferret out fraud and report it to the appropriate agencies for further investigation. ER 261, Ex. 21. Biddle also understood that this responsibility existed for all "open years" (1981 through 1993) involved in this action. ER 261, Ex. 10, Appendix A. As confirmation of this understanding, on June 2, 1991, Biddle himself wrote a memorandum listing his ongoing job responsibilities, including:

> a. Coordination and assistance to DCAA in the conduct of audits of indirect costs, both proposed and actual, for *the years now open . . . These would include 1981 - 1991 actuals* and 1992, 1993, and 1994 proposed indirect cost rate submissions.
>
> b. Coordination and assistance to DCAA in the conduct of audits of staff benefits . . . *These would include 1981-1991 actuals* and 1991, 1993, and 1994 proposed staff benefit rate submissions. . . .
>
> c. Continued attention to documenting matters that are *likely to portend civil and/or criminal wrongdoing on the part of Stanford.*

. . . .

f. Additional time to review and prepare documents that *may become part of the liltigative (sic) process at some time in the future.*

. . . .

h. Identification of Stanford Accounts and transactions from readings of the Stanford Campus Report [the University-published newspaper] in prior years to *determine specific targetting [sic] areas for DCAA audits that will provided [sic] additional recoveries to the Federal Treasury.*

. . . .

m. Continued analysis of the Operations and Maintenance activities at the university as they regard *abuse, waste and fraud.*

n. Continued documentation of events during the 1980's for the Dingell Committee.

. . . .

s. Continued *review and analysis of the extent of abuse and waste* associated with relaxed property controls and oversight and transfers by ONR in prior years at Stanford.

ER 261, Ex. 10, Appendix A. (Emphasis supplied). Biddle's understanding of his duties and his actions, including requesting that DCAA perform audits, is completely

consistent with (and indeed required by) his responsibility for "safeguarding the interests of the United States" and requesting audits in support of that duty. ER 261, Exs. 18, 19, 20.

Biddle's superiors also wrote memoranda confirming Biddle's duty to disclose fraud. On September 6, September 21 and October 11, 1990, the Director of the Office of Naval Research sent Biddle memoranda assigning him to "devote [his] full attention to assist[ing] the OCNR [Inspector General] in the preparation of his report on the Stanford overhead negotiation matter." ER 261, Ex. 11. On June 11, 1991, Biddle received a memorandum from the Director instructing him that his "imperative responsibility" was to support the Naval Investigative Service in its investigation of "possible criminal conduct at Stanford University." ER 261, Ex. 8. Thus, Biddle 's duties required him to uncover and disclose fraud, Biddle understood that his duties required him to uncover and disclose fraud, and Biddle in fact sought to uncover and disclose fraud.

4. *The district court's factual determination regarding Biddle's job responsibilities.*

Based on these facts, the district court found:

> As a contracting officer, plaintiff clearly had a duty to ensure that those claims he reviewed, the indirect cost proposals he analyzed, the indirect cost rates and advance agreements [memoranda of understanding or MOUs] he negotiated were adequately supported. Moreover, it was his duty to refer suspected fraudulent claims to the appropriate investigatory authority. Therefore,

> plaintiff was clearly operating under compulsion of the directives of his job in disclosing suspected fraud in claims and negotiations he handled during his term as the ONRRR [ONR Resident Representative] Stanford.

ER 267, pp. 7-8. As the district court explained, "[t]o find otherwise would create an incentive for contracting officers to approve claims knowing they were false or fraudulent, so a later qui tam action could be brought." ER 267, p. 8, n.4. The district court weighed the evidence before it and found that Biddle was compelled to disclose to the government any evidence of alleged fraud. ER 267. That determination is fully supported by the record.

5. *The Court of Appeals' Decision.*

Contrary to petitioner's assertions, the Court of Appeals did not "prohibit *all* Government employees from acting as qui tam relators." Pet., p. 23. Rather, the Court of Appeals undertook a careful review of the entire record in order to determine whether Biddle's disclosure to the government was compelled by his job duties and therefore was not made "voluntarily." The Court of Appeals correctly concluded that "[u]pon reviewing the evidence relied upon by the district court, we believe the [district court's] findings are not clearly erroneous." Pet. Appx. p. 23a. In the proceedings before the district court, Stanford had presented extensive evidence setting forth Biddle's job duties, which required him to uncover and disclose fraud. In light of this evidence and the district court's findings, the Court of Appeals correctly held that Biddle's disclosure to the government was not voluntary.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S INTERPRETATION OF "BASED UPON" IS CONSISTENT WITH THE DECISION OF EVERY CIRCUIT THAT HAS ADDRESSED THE ISSUE IN RECENT YEARS.

Biddle's petition hinges on his claim that "[t]his Court should resolve the split in the circuits and clarify the meaning of the phrase[ ] 'based upon' " in the False Claims Act. Pet., p. 8. In fact, the Ninth Circuit 's interpretation is consistent with the decision of every circuit that has addressed the issue in recent years.[1]

Biddle attempts to rely upon the Fourth Circuit's holding in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994), that " 'based upon' in the FCA means 'derived from.' " Pet., p. 10. However, Biddle fails to recognize that every circuit since *Siller* has rejected the *Siller* interpretation of "based upon." The Fifth, Sixth, Tenth and District of Columbia Circuits have each held, subsequent to *Siller*, that "based upon" means "same as" or "supported by," as the Ninth Circuit holds here. *See Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995); *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 940 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 855 (1998); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1546 (10th Cir. 1996); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675,

1. In addition, the Ninth Circuit's decision herein is consistent with two prior Ninth Circuit decisions. *See* Pet. Appx., p. 10a.

682 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997). Indeed, those decisions expressly discredit *Siller*. *See McKenzie*, 123 F.3d at 940; *MK-Ferguson*, 99 F.3d at 1546; *Findley*, 105 F.3d at 682.

In addition to these post-*Siller* decisions, numerous decisions prior to, or contemporaneous with, *Siller* (including decisions of the Second, Third and Eleventh Circuits) have reached a conclusion similar to that of the Ninth Circuit here. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2nd Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1989); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *Cooper v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562, 567 (11th Cir. 1994).

The most complete analysis was provided by the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993). The Tenth Circuit examined the phrase "based upon the public disclosure of allegations or transactions" and explained that as a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." *Id.* Relying on the principle that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction," the Tenth Circuit reasoned that its limited interpretation of who could sue under the statute protected the incentive for private citizens with first-hand knowledge to expose fraud. *Id.* at 552.

It makes no difference whether the *qui tam* relator is the one who caused the public disclosure. The issue is simply whether the allegations are supported by the public disclosure.

Here, Biddle filed his *qui tam* suit six months *after* the congressional hearing and over one year *after* reports in the media.

Relying on the discredited decision in *Siller*, Biddle nonetheless argues that his allegations were not "based upon" or "derived from" public disclosures because he had never seen or read any such public disclosures prior to obtaining the knowledge upon which his complaint was based. The position of the Fourth Circuit in *Siller* is contrary to that of every other circuit that has addressed the term "based upon."[2] To date, eight circuits have interpreted the term "based upon" as meaning the "same as" or "supported by" publicly disclosed information.

The *Siller* court (and Biddle) rely on one of the dictionary definitions of the term "based upon" ("to use as a basis for") without fully considering the context of the phrase in the False Claims Act. A more reasonable reading of

> the language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions . . . when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

United States ex rel. Springfield Terminal Railway Company, 14 F.3d 645, 654 (D.C. Cir. 1994).

Biddle's proposed interpretation of "based upon" is inconsistent with the basic structure of the False Claims Act

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2. In addition to *Siller*, Biddle relies upon two district court decisions — one that is unpublished, and another that pre-dates *Siller*. Pet., p. 11. Both are completely out of step with all the circuits, except the Fourth Circuit in *Siller*.

because it would render the "original source" exception to the public disclosure bar largely superfluous and surplusage. The "original source" exception requires that the relator (1) had "direct" knowledge of the alleged fraud; (2) had "independent" knowledge of the alleged fraud; (3) voluntarily provided the information to the government; and (4) had a hand in the public disclosure of the alleged fraudulent allegations or transactions. *Springfield Terminal Ry. Co.*, 14 F.3d at 656; *Houck on Behalf of United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504-505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); *Wang v. FMC Corporation*, 975 F.2d 1412, 1418 (9th Cir. 1992). Biddle's proposed interpretation of "based upon" would require a court first to determine whether the plaintiff has direct and independent knowledge of the information and, if so, the complaint would not be "based upon" a public disclosure. Such an interpretation would make the "direct and independent knowledge" prong of the original source requirement unnecessary.

Thus, dismissal of Biddle's action was consistent with the purpose of the False Claims Act — to uncover and disclose fraud against the United States. Biddle's allegations are no more than "a rehash of what already had been publicly disclosed." *Id.* at 1417. Biddle's complaint was "based upon" public disclosures.

Finally, Biddle erroneously asserts that "[t]he legislative history supports a reading of the statute which broadens rather than constricts subject matter jurisdiction . . . ." Pet., p. 16. The stated purpose of the 1986 amendments to the False Claim Act is contained in the legislative history of those amendments, which proclaims:

> I. PURPOSE OF THE BILL. The purpose of S.1562, the False Claims Reform Act, is to enhance the government's ability to recover losses sustained as a result of fraud against the government.

S. Rep. No. 345, 99th Cong., 2d Sess. 2, reprinted in 1986 U.S.C.C.A.N. 5266 (1986). The Senate Report concluded that "only a coordinated effort of both the government and the citizenry will decrease this wave of defrauding public funds." Id. at 5267. Accordingly, the Senate Bill "increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the government," not for government employees to bring suits the government could and should bring itself. *Id.* (Emphasis supplied).

Because the primary concern of Congress was to enhance recoveries to the Treasury for fraud against the government, Congress sought to eliminate private actions based on information about which the government and the citizenry already had knowledge. Consequently, Congress included the public disclosure bar in the 1986 amendments to screen out actions filed after the government and the citizenry possessed sufficient information to rouse them to action.

Here, the allegations contained in Biddle's complaint had been publicized for over a year before the filing of his complaint. Prior to the filing of Biddle's complaint, the allegations had been disclosed on literally hundreds of occasions in the *San Jose Mercury News*, *The Wall Street Journal*, the *San Francisco Chronicle* and the television news magazine "20/20," just to name a few. ER 226 at BS 48, 55, 75, 225. Because of the widespread notoriety of the allegations of fraud against Stanford, both the government

and the citizenry were keenly aware of the circumstances surrounding these allegations. Biddle's *qui tam* complaint, therefore, did absolutely nothing to enhance the government's ability to recover losses, if any, that would otherwise go undiscovered. Significant government resources had already been devoted to determining if there was any fraud and recovering any alleged fraud losses[3] — and none was found. Thus, Biddle's complaint did not serve the stated purpose of the False Claims Act of recovering fraud losses that would otherwise go unrecovered.

Moreover, the paradigm whistle-blower action which Congress sought to authorize through the False Claims Act involves a private citizen with direct knowledge of undisclosed fraud against the government who brings a *qui tam* action after voluntarily disclosing to the government the allegations of fraud. *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995), *cert. denied*, 517 U.S. 1233 (1996). Congress envisioned the paradigm qui tam case as one "in which an insider at a private company brings an action against his own employer." *Id.* at 742. By allowing whistle-blowers to bring suits on behalf of the government and recover a generous bounty, the government hopes to encourage private citizen whistle-blowers to bring to light fraud which might otherwise go undetected. *Id.*

> Legislative history also suggests that Congress envisioned only this paradigm suit when enacting

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3. By the time of Biddle's complaint, Stanford had been or was being investigated by at least the OCNR Inspector General, the Naval Investigative Service (a criminal investigative agency), the Special University Team of ONR, the DCAA, the General Accounting Office, and the Subcommittee on Oversight and Investigations of the House of Representatives Committee on Energy and Commerce (which held two public hearings before the suit was filed). ER 226, Exs. C, D.

> the current version of the *qui tam* provisions. The Senate Report to the 1986 amendments to the False Claims Act, for instance, states that "[t]he Committee's overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement suits."

Fine, 72 F.3d at 742, quoting S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986).

> Similarly, the House Report emphasizes that "[t]he purpose of the *qui tam* provisions of the False Claims Act is to encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward."

Id., quoting H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986). A case involving a "*government* employee" whose duty it is to disclose fraud to his supervisors "defies the paradigm." *Fine*, 72 F.3d at 742-43.

The intent of the False Claims Act is not served by allowing Biddle, a government employee charged with safeguarding the government's interests in the contracts at issue, to bring a *qui tam* suit to collect a personal windfall.

II.

THE COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S DETERMINATION THAT BIDDLE'S DISCLOSURE TO THE GOVERNMENT WAS NOT VOLUNTARY, AND THEREFORE BIDDLE CANNOT BE AN "ORIGINAL SOURCE" UNDER THE FALSE CLAIMS ACT.

Petitioner Biddle's remaining argument — that the Court of Appeals' decision "effectively precludes all government employees from acting as relators" (Pet., p. 17) — also mischaracterizes the Court of Appeals' decision. In fact, the Court of Appeals simply holds that Biddle's disclosure to the government was compelled by his job duties and therefore was not voluntary:

> In determining whether Biddle came forth voluntarily, the district court examined the pertinent regulations and other official documentation of Biddle's responsibilities as an ACO [Administrative Contracting Officer]. The court then concluded:
>
> > As a contracting officer, plaintiff clearly had a duty to ensure that those claims he reviewed, the indirect cost proposals he analyzed, [and] the indirect cost rates and advance agreements . . . he negotiated were adequately supported. Moreover, it was his duty to refer suspected fraudulent claims to the appropriate investigatory authority.

> Upon reviewing the evidence relied upon by the district court, we believe that the court's above findings are not clearly erroneous. Based on those findings, we hold that Biddle did not voluntarily disclose the alleged fraud regarding the contracts that were negotiated while he was employed as an ACO.

Pet. Appx., pp. 22a-23a.

Biddle ignores the "clearly erroneous" standard of review and reargues the evidence. The Court of Appeals emphasized:

> Although the question of whether Biddle was a volunteer is one of law to be reviewed *de novo*, this court must accept the district court 's findings of fact supporting its conclusion of involuntariness unless they are clearly erroneous.

Pet. Appx., pp. 17a-18a. The factual determinations of the district court underlying the Court of Appeals' holding are fully supported by the record, and certainly not clearly erroneous. In the proceedings before the district court, Stanford presented extensive evidence setting forth Biddle's job duties. That evidence included not only the Federal Acquisition Regulation, part of which was discussed by Biddle in his petition for rehearing (ER 261, Ex. 22), but also Naval Acquisition Procedures Supplement (ER 261, Ex. 13), memoranda written by Biddle (ER 261, Ex. 10, Appendix A), memoranda written by Biddle's superiors (ER 261, Exs. 8, 11) and a declaration of one of Biddle's superiors (ER 263). Biddle ignores these facts and the findings of the district court and, instead, attempts to substitute his own version of the facts.

Biddle erroneously asserts that the Court of Appeals "essentially holds that Government employees lose their ability to act voluntarily in reporting fraud once they enter public service" (Pet., p. 25), because all Government employees have duties similar to Biddle's. Again, Biddle ignores the extensive evidence setting forth Biddle's job duties, which were focused on the specific contracts at issue and went far beyond those of most government employees. Biddle did not just have a general duty to safeguard the interests of the United States; Biddle had a specific duty to safeguard those interests in the government contracts in question. *See supra*.

In light of this evidence and the district court's findings, Biddle is wrong in asserting that the Court of Appeals ruled that "federal employees can never act as *qui tam* relators." Pet., p. 23. The extensive evidence setting forth Biddle's job duties confirm that Biddle's disclosure to the government was not voluntary.[4]

Biddle also argues that his job duties "did not require that he ferret out fraud, investigate it, and report it to Congress." Pet., p. 18. Biddle's argument finds no support in section 3730(e)(4) of the False Claims Act, which requires that a Government employee asserting a *qui tam* claim "has

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4. Based upon his erroneous assumption that the Court of Appeals holds "that any duty to refer or report fraud bars such person from serving as a relator" (Pet., p. 22), Biddle argues that "[t]he Ninth Circuit's interpretation of 'voluntary' conflicts with the Congressional purpose of increasing the courts' subject matter jurisdiction." Pet., p. 20. But that is not the Court of Appeals' holding. The Court of Appeals held that Biddle's disclosure was not voluntary, in light of the district court's findings regarding Biddle's job duties compelling such disclosure.

voluntarily provided the information *to the Government*." 31 U.S.C. § 3730(e)(4)(B). Section 3730(e)(4) draws no distinction between branches of government. If, as here, disclosure to the government was compelled by the employee's job duties, he cannot qualify as an "original source" under the False Claims Act, regardless of his "persistence and tenacity." In any event, Biddle himself understood that his job duties included "[c]ontinued documentation of events during the 1980's for the Dingell Committee" of Congress. ER 261, Ex. 10, Appendix A.[5]

Finally, Biddle erroneously asserts that the Court of Appeals' decision is "in conflict with Ninth Circuit case law . . . that the 1986 amendments to the FCA did not bar Government employees from bringing *qui tam* actions." Pet., p. 23. There is no such conflict. The Court of Appeals' decision correctly states and applies its prior holding in *United States ex rel. Fine v. Chevron USA, Inc.*, 72 F.3d 740 (9th Cir. 1995). In *Fine*,

> [t]his court held that the relator did not disclose fraud voluntarily because "[h]e was a salaried government employee, compelled to disclose fraud by the very terms of his employment."

Fine, 72 F.3d at 743. Pet. Appx., p. 18a. The Court of Appeals' opinion explains:

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5. Biddle argues that he continued investigating "when faced with obstinacy on the part of his supervisors." Pet., p. 19. This was not a finding of the district court, and Biddle fails to address the Court of Appeals' determination that it would not "transform this unearthing of possible fraud into a voluntary investigation." Pet. Appx., p. 21a. By accepting his position as Administrative Contracting Officer, Biddle took on this duty and any attendant difficulties in performing it. Pet. Appx., pp. 21a-22a.

> The purposes underlying the FCA [False Claims Act] are to encourage individuals to report potential fraudulent activities being committed against the government, and to reward them for doing so. But where a government employee is paid to perform this function, the employee should not receive a windfall for merely doing his job. Biddle earned a government salary to perform various tasks, one of which was to report suspected fraud to his supervisors. Thus, he was a "salaried government employee, compelled to disclose fraud by the very terms of his employment." *Fine*, 72 F.3d at 743. . . . Why should he now receive a possible windfall for simply doing that which he was required to do and was paid to do?

Pet. Appx., pp. 21a-22a.

Contrary to Biddle's erroneous assertion (Pet., pp. 26-27), the Court of Appeals' decision does not conflict with its prior decision in *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996), *cert. denied*, 519 U.S. 865 (1996) ("*Hagood II*"). In *Hagood II*, the government employee's job "was not to expose fraud, but to draft contracts and perform other legal services for the Corps." Pet. Appx., p. 18a; quoting *Hagood II*, 81 F.3d at 1476, n.19. By its terms, *Hagood II* addresses a situation where the government employee's job is limited in scope and does not include exposing fraud. Here,

however, Biddle's disclosure was compelled by his job duties.[6] The Court of Appeals' decision correctly notes that Biddle's

> documented job responsibilities make it clear that his position entailed more than simply drafting contracts like the relator in *Hagood II*; Biddle had a duty as an ACO [Administrative Contracting Officer] to disclose fraud.

Pet. Appx., p. 21.

Thus, there is no "intra-circuit conflict," let alone any inter-circuit conflict, that would warrant certiorari.

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6. The fact that Biddle's disclosure was compelled by his job duties is critical. "[W]here a government employee is paid to perform this function, the employee should not receive a windfall for merely doing his job." Pet. Appx., p. 22a. Thus, this is readily distinguished from the situation Biddle asserts was posed in *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), where a statute required disclosure of information by a state. *See Pet.*, pp. 21-23.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, EX REL., PAUL BIDDLE,
Petitioner,

v.

BOARD OF TRUSTEES OF THE LELAND STANFORD, JR. UNIVERSITY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Stanford's Brief in Opposition misstates the law and the facts in several respects and inappropriately minimizes the import of the Ninth Circuit's decision in this case.

I. The Government Did Not Vindicate Stanford

Stanford's assertion that it "has repeatedly been vindicated by the government regarding Biddle's allegations of fraud," *see* Op. Br. at 4, is irrelevant, patently false, and a mischaracterization of the Government's actions in this case. As an initial matter, Stanford's cries of vindication have absolutely no bearing on the merits of the issue before this Court. The district court deprived Biddle of any opportunity to present his evidence on the merits of the false claims as a result of its ruling on subject matter jurisdiction. Thus, Stanford's "vindication," or lack thereof, has yet to be adjudicated by any court of law.

In any event, the fact that the Government chose not to intervene in this action but instead elected to allow Biddle to prosecute the FCA claims does not at all mean that the Government found Stanford to be without fault or free of liability for its years of overcharges. *See* 31 U.S.C. § 3730(b)(4)(B). Indeed, in its Notice Declining Intervention (cited by Stanford as CR 42) the Government requested that the Complaint be unsealed and served on Stanford and not be "dismissed, settled, or otherwise discontinued" without the written consent of the Attorney General (which was never obtained). Further, the Government explicitly reserved its right to "intervene in this action at a later date." Had the Government found Biddle's suit to lack merit, the Government would have filed a motion to dismiss the action. *See* 31 U.S.C. § 3730(c)(2)(A). Allowing Biddle's suit to continue, however, furthered the express purpose of the FCA – to encourage individuals to expend private resources to collect defrauded funds when the Government's resources are stretched too thin. *See United States ex rel. Findley v. FPC-Boron Employees'*

Club, 105 F.3d 675, 679 (D.C. Cir. 1997) ("[t]he *qui tam* provisions offset inadequate law enforcement resources").

Stanford's assertion that the Office of Naval Research ("ONR") "did not find any fraud," Op. Br. at 4, is a gross misrepresentation as shown by the very ONR documents cited by Stanford which state:

> [T]there appears to be some validity to [Biddle's] concern that the Government has overpaid Stanford for indirect costs during the period 1980-1989 . . . .

ER 226, Ex. D at p. 59 ("Report of Inquiry Into Stanford University Overhead Rates" dated Jan. 19, 1991).

> The government audited the rates and costs in question. * * * These audits produced a potential $185 million in questionable charges to the government.

ER 226, Ex. B at B-S 1429-30 (ONR News Release dated Oct. 1994).

Indeed, as part of ONR's settlement of Stanford's "contract" claims against the Government, Stanford returned $1.2 million to the Government—hardly a vindication of Stanford. As part of that settlement, the ONR issued the above quoted press release noting that the audits had disclosed "questionable charges" but that the Government "[did] not have a claim [of] . . . fraud" against Stanford. The statement that ONR "did not have a claim" of fraud following the settlement does not mean that Stanford had not made false claims prior to the settlement of the contract claims.

Stanford's claim that the Defense Contracting Audit Agency ("DCAA") "did not find any fraud," Op. Br. at 4, also is blatantly false and flies in the face of a 1993 DCAA audit report that states:

> As you know, previous audits of Stanford's indirect cost submissions lead us to conclude that Stanford has overbilled the government about $230,000,000 for prior year indirect costs not appropriately allocable to government work.

CR 185, Ex. B at 3.[1]

These audits led to a $20 million per year reduction of Stanford's recovery of indirect costs from the Government. Stanford has in no way been vindicated for its fraudulent pattern of overcharging the Government.

II. Stanford Misstates The Current Law On The FCA's "Based Upon" Language And Misconstrues Biddle's Interpretation Of That Language

Stanford erroneously asserts that there is no split in the circuits on the meaning of "based upon" in the FCA and misconstrues Biddle's argument regarding the meaning of that language.

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[1] Stanford's citation to CR 1, Ex. C for the proposition that DCAA "did not find any fraud" is completely unsupported by the cited DCAA document, which states that all agreements between Stanford and ONR should be terminated because they "often result in reimbursement above and beyond that contemplated . . .and are not considered to be in the government's best interests." CR 1, Ex. C. Nowhere does DCAA state that it "did not find any fraud" as Stanford asserts.

A. The Ninth Circuit's Interpretation Of "Based Upon" Is Not "Consistent With The Decision Of Every Circuit" – A Split Of Authorities Continues To Exist Five Years After It Began

The fact that other circuits have considered the Fourth Circuit's interpretation of "based upon" and rejected it does not mean, as Stanford suggests, that a circuit split does not exist. *See* Op. Br. at 10. It is precisely because of these conflicting decisions that a split in the circuits exists which requires this Court's attention.

Although Stanford is correct that the majority of circuits interpret "based upon" to mean "same as," *see* Op. Br. at 10-11; Pet. at 12, this fact alone does not make the majority rule correct nor does it make the conflict any less problematic or the effect on *qui tam* relators any less harsh. Such a split in authorities also encourages forum shopping as *qui tam* relators search for a jurisdiction that will be friendly to a private FCA suit.

B. Biddle's Interpretation Of "Based Upon" Gives Effect To All Parts Of The FCA While The Ninth Circuit's Interpretation Does Not

Contrary to Stanford's assertions, Biddle's interpretation of the FCA does not render the original source inquiry surplusage. *See* Op. Br. at 12-13. As Biddle and Stanford agree, the 1986 amendments to the FCA were designed to encourage more private enforcement suits and discourage parasitic ones. *See* Pet. at 15; Op. Br. at 14. The three-part test of the public disclosure bar is intended to eliminate parasitic suits before they begin. The first prong of the test asks whether or not the FCA action before the court is based, in any part, upon public information. *See* 31 U.S.C. § 3730(e)(4)(A). If the complaint contains such public information in whole or in part, the relator must then demonstrate that he contributed valuable independent

information to the complaint consistent with the purposes of the FCA. *See* Pet. at 11-12.

In contrast, if the complaint is based entirely upon information which the relator himself uncovered, the relator should not have to prove that he has direct and independent knowledge of the allegations or that his disclosure to the Government was voluntary because the complaint is in no way parasitic. Thus, only in a case such as Biddle's where the relator's information is entirely derived from his own efforts, is the second part of the public disclosure bar inapplicable. In every other case, where information in the complaint is derived from public disclosures in any way, the relator must then demonstrate his direct and independent knowledge and his voluntary disclosure to the Government.

In contrast, Stanford's and the Ninth Circuit's interpretation of the words "based upon" renders those words meaningless in every case. This is so because the public disclosure bar of the FCA is raised only if information in the complaint is already in the public domain. Once information of the allegations of fraud are in the public domain, however, the Ninth Circuit has answered the first question of the public disclosure bar before the question is ever asked. If the fraud allegations are already in the public domain, the information in the complaint is automatically "the same as" or "based upon" those public disclosures. Thus, if Stanford and the Ninth Circuit are correct, the words "based upon" have no meaning whatsoever in any FCA action.

III. As Respondent Concedes, The Purpose Of The 1986 Amendments To The FCA Was To Encourage More Private Enforcement Suits And Allowing Biddle's Suit To Go Forward Furthers That Purpose

As Stanford repeatedly states, the 1986 amendments to the FCA were intended to "enhance" recovery of fraudulently obtained Government funds, to increase incentives for private FCA actions, and to "encourage more private enforcement

suits." Op. Br. at 14-16. Yet, Stanford inexplicably asserts that allowing Biddle's action somehow defeats these purposes.

Stanford suggests that the Government "could and should" bring such suits itself. Op. Br. at 14. This, of course, would be axiomatic if the Government had unlimited resources. But it does not. Stanford itself acknowledges that a "coordinated effort" between the Government and private citizens is essential to carrying out the FCA's mandate. *Id.* (citations omitted). Further, the suggestion that the Government could have successfully prosecuted this civil action without Biddle ignores the essential nature of the information *provided by* Biddle.

Finally, the suggestion by Stanford that Biddle is no longer a private citizen because he worked for the Government rather than for a private entity is patently absurd. The legislative history cited by Stanford states that the purpose of amending the FCA was to "encourage more private enforcement suits." Op. Br. at 16 (citations omitted). This legislative history does not differentiate between relators on the basis of their employment status. Government employees are private citizens.

IV. The Regulations Cited By Stanford Did Not Render Biddle's Disclosures To His Superiors And To Congress Involuntary

The Federal Acquisition Regulations ("FAR") and the Navy Acquisition Procedures Supplement ("NAPS"), which Stanford relies upon so extensively, *see* Op. Br. at 5-6, require only that Biddle *refer* fraud to the appropriate authorities *if he sees fraud*. The FAR and NAPS do not require Biddle to seek out fraud or to investigate fraud when he finds it nor do they require Biddle to conduct an audit of Stanford's conduct. The regulations merely require that contracting officers "safeguard[] the interests of the United States," FAR, 48 C.F.R. § 1.602-2, and "refer" instances of possible fraud "to the Navy Inspector General for review or the conducting of an

investigation." NAPS, 48 C.F.R. § 33.209. Nothing about any of the regulations cited by Stanford makes Biddle's whistleblowing involuntary. In particular, no regulation cited by Stanford compelled Biddle to "uncover and disclose fraud," Op. Br. at 8, or to investigate such fraud and report it to higher levels of Government when his supervisors opted to turn a blind eye.

Similarly, despite the weight Stanford gives Biddle's memorandum reciting his job responsibilities, the memorandum has no legal significance. Because Biddle wrote the memorandum *after* blowing the whistle on Stanford, it says nothing regarding the duties Biddle labored under at the time he uncovered, investigated and disclosed Stanford's fraudulent conduct. Even if the memorandum could be given some legal effect, Biddle only acknowledges that he was to *prospectively coordinate and assist* while the DCAA *conducted* audits. Again, nothing in the memorandum required Biddle to ferret out fraud in the first instance.

Most importantly, nothing cited by Stanford required Biddle to continue "to do the audits he had been told were not his job, [tell] a committee of Congress what he had found, and trigger[] an investigation." Pet. App. at 26a (Kleinfeld, J., dissenting). Biddle acted voluntarily and without compulsion when he pursued his cause so vigorously.

V. Stanford's Argument That Biddle Ignores The Clearly Erroneous Standard Is A Red Herring – To The Contrary, Biddle's Argument Accepts The Trial Court's Findings Of Fact

Biddle does not "reargue[] the facts" in his Petition or "ignore[] the 'clearly erroneous' standard of review." Op. Br. at 18. In fact, Biddle's argument rests on the assumption that the trial court's findings regarding his job duties are correct and argues instead that the trial court erred in its application of the law to those facts. The trial court's determination that Biddle's job duties made his disclosure involuntary is a

jurisdictional, legal question, *see Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1472 (9th Cir. 1996), and the Ninth Circuit's affirmance of that determination is at issue, not whether the factual findings are "clearly erroneous."

The district court's opinion contains no factual finding that Biddle was required by his job to search for fraud, investigate the fraud despite opposition from his superiors, or pursue the fraud all the way to the United States Congress if all other channels presented dead ends. Stanford's suggestion that the FCA's requirement of disclosure to the Government "draws no distinction between branches of government," *see* Op. Br. at 20, misses the point. Biddle's testimony before Congress could only accurately be labeled involuntary if his job duties required such testimony. There is no finding to that effect in the trial court's opinion and the dissent directly discredits any such suggestion. *See* Pet. App. at 26a. Thus, even assuming that Biddle was compelled to disclose this information to his supervisors at ONR, that duty did not make his subsequent disclosures to Congress involuntary and that duty did not require Biddle's continued pursuit of the allegations on his own time and with his own money once his ONR supervisors failed to respond.

VI. Stanford Ignores Judge Kleinfeld's Dissent, The Obvious Import Of The Majority's Holding With Respect To Government Employees, And The Conflict Between The *Hagood* And *Fine* Holdings

Significantly, Stanford's brief never once mentions Judge Kleinfeld's dissent or his recognition that the majority opinion in *Biddle* effectively precludes all government employees from proceeding as *qui tam* relators and conflicts with the Ninth Circuit's holdings in *Hagood* and *Fine*. As Judge Kleinfeld acknowledges, the "evidence setting forth Biddle's job duties," Op. Br. at 19, demonstrates no greater a duty of disclosure on Biddle's part than Hagood's duty as a lawyer to "not knowingly assist in committing a fraud." App. at 26a (Kleinfeld, J., dissenting).

Stanford's bold assertion that an attorney's job "is limited in scope and does not include exposing fraud," Op. Br. at 21, defies logic, common sense, and the Rules of Professional Conduct. The idea that Biddle's duties as a contracting officer could somehow be more extensive than an attorney's duty to avoid assisting in the commission of fraud is equally specious.

The question Biddle asks this Court to address is simple – whether or not citizens who have some generalized duty to refer fraud to the Government, *i.e.*, all Government employees according to the language of Executive Order No. 12,674, should automatically be excluded from the pool of potential FCA relators under the "voluntary" test enunciated by the Ninth Circuit. Had that been Congress' intent, Congress could have expressly forbidden all Government employees from pursuing *qui tam* actions. *See* Pet. at 23-25. Rather than applying the plain statutory language, the Ninth Circuit has engrafted onto the FCA an additional exception to the courts' jurisdiction – that action is not judicial review but judicial governance.

VII. Stanford Fails To Distinguish *Dean* And The Legislative History Of The FCA

Stanford dismisses, in a footnote, Biddle's argument that the Ninth Circuit's interpretation of the voluntariness requirement conflicts with the statute's legislative history. *See* Op. Br. at 22 n.6. Stanford claims that the statutory duty at issue in *Dean* is somehow distinguishable from the regulatory job duties that Biddle labored under. Stanford suggests that Biddle would receive a windfall for merely doing his job while the state of Wisconsin in *Dean* could appropriately pursue an action since it was compelled to report fraud as a recipient of federal funds and not as an employee. This distinction is meaningless.

Federal law required Wisconsin to disclose instances of Medicare fraud to the United States Department of Health and

Human Services as part of the state's participation in the federal government's Medicare reimbursement program. *See United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984). Thus, in exchange for federal grant money, Wisconsin had a *duty* to "report various fraud and abuse information" to the Government. *Id.* at 1106. Therefore, Wisconsin would receive the very same "windfall" that Stanford and the Ninth Circuit find so offensive in this case – payment from the federal government for performance of a duty *and* recovery under the FCA as a result of those same disclosures. Neither Stanford nor the Ninth Circuit explain why the result in *Dean*, which Congress explicitly rejected in 1986, should now be given new life.

To the contrary, it is precisely because of the "perverse" decision in *Dean* that Congress acted in 1986 to amend the FCA. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1163 (3d. Cir. 1991) (Scirica, J., dissenting); *see also Findley*, 105 F.3d at 680 ("another defect" of the FCA before 1986 was the outcome of the *Dean* case). Any purported "windfall" to Biddle is not the issue in this case. The issue is whether or not Biddle is an appropriate *qui tam* relator under the terms of the FCA and whether or not he will be allowed to prosecute this action so that the Government can recoup lost taxpayer dollars.

CONCLUSION

The petition should be granted.

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